

## Articles

### ZOMBIE RELIGIOUS INSTITUTIONS

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**ABSTRACT**—This Article uncovers and names a phenomenon of pressing importance for healthcare policy and religious liberty law: the rise of zombie religious institutions—organizations that have contractual commitments to religious identity but lack actual attachments to churches or associations of religious people. Contracts create religion—sometimes in perpetuity—for institutions that are not, or never have been, religious and for providers who do not share the institution’s religious precepts. This Article details religion’s spread across healthcare through affiliations, mergers, and—most surprisingly—sales of hospitals that continue religious practice after their connection to a church ends. These contracts require hospitals—secular and religious, public and private, for-profit and nonprofit—to comply with religious tenets. “Religious” institutions far removed from the paradigm of the church populate the marketplace. In this way, private law impedes public policy, expanding the universe of institutions eligible for religious exemption from otherwise applicable laws. Moreover, as the category of religious institution loses its specialness, theories of religious institutionalism founder. The presumption of autonomy of religious institutions from regulation cannot survive in the marketplace where religious identity can be bought and sold.

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INTRODUCTION

West Suburban Hospital is a zombie religious institution. It does not unite a community of religious people. It is disconnected from any church. Located in Oak Park, Illinois, a suburb of Chicago, West Suburban was an independent community hospital when Catholic Resurrection Health sought to purchase it in 2004.<sup>1</sup> Its medical staff did not share the Catholic values of the buyer; indeed, they opposed religious restrictions on their treatment of patients. The sale, however, ultimately went through.<sup>2</sup> West Suburban became Catholic. Just five years later, West Suburban was sold to a for-profit investor. By the terms of the sale, the now-for-profit hospital will not be listed as Catholic and must remove crucifixes and religious art.<sup>3</sup> Nonetheless, it remains obligated to prohibit the performance of abortions and sterilizations.<sup>4</sup> Based on five years of Catholic ownership in its almost 100-year history, West Suburban became perpetually bound to Catholic restrictions.<sup>5</sup> By contract, this previously secular institution became religious. Once sold, the religious institution survived in zombie form—

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<sup>1</sup> Marty Stempniak, *West Sub Sold to MacNeal Owner*, OAKPARK.COM (published Nov. 24, 2009, 2:06 PM; updated Dec. 1, 2009, 10:10 PM), <http://www.oakpark.com/News/Articles/12-1-2009/West-Sub-sold-to-MacNeal-owner> [<https://perma.cc/6E3Q-PDE5>].

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Edwin Yohnka, *A Bad Deal for Health Care in Illinois*, HUFFINGTON POST (published May 20, 2010, 6:42 PM; updated May 25, 2011), [http://www.huffingtonpost.com/edwin-yohnka/a-bad-deal-for-health-car\\_b\\_584000.html](http://www.huffingtonpost.com/edwin-yohnka/a-bad-deal-for-health-car_b_584000.html) [<https://perma.cc/F3LG-79PB>].

lacking a live connection to religion but contractually committed to religious identity.

Zombie religious institutions have emerged at a moment when law and theory have taken a distinctly institutional turn. This new religious institutionalism places institutions—not individuals—at the core of religious liberty and grants them a special status in the social order.<sup>6</sup> The doctrinal high-water mark is the 2012 *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC* decision, in which the Supreme Court carved out a constitutional sphere of substantial autonomy from regulation for religious institutions through a doctrine known as the ministerial exception.<sup>7</sup> Encouraged by *Hosanna-Tabor*, a number of legal scholars advocate granting near-absolute immunity from governmental regulation to churches—defined to encompass at least some commercial entities.<sup>8</sup>

The Supreme Court’s 2014 decision in *Burwell v. Hobby Lobby Stores, Inc.* shed additional light on this problem.<sup>9</sup> In a challenge to the Affordable Care Act’s mandate that insurance plans cover contraception, the Supreme Court held that closely held for-profit corporations could promote religion like nonprofit religious organizations and were equally entitled to religious accommodation.<sup>10</sup> Ascribing religion to the for-profit corporation—that is, a nexus of contracts<sup>11</sup>—the Court’s decision further raised the stakes for religious institutionalism.<sup>12</sup>

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<sup>6</sup> See, e.g., Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 VILL. L. REV. 273, 293 (2008) (“[A]n appropriately institutional approach to the Religion Clauses would involve attention to the religious-freedom rights of religious entities . . .”).

<sup>7</sup> 565 U.S. 171, 179, 188 (2012) (holding that religious institutions need not comply with the Americans with Disabilities Act with regard to employees who are “ministers”).

<sup>8</sup> See generally Paul Horwitz, *Freedom of the Church Without Romance*, 21 J. CONTEMP. LEGAL ISSUES 59, 59–60 (2013); John D. Inazu, *The Freedom of the Church (New Revised Standard Version)*, 21 J. CONTEMP. LEGAL ISSUES 335, 338 (2013); Steven D. Smith, *Freedom of Religion or Freedom of the Church?*, in LEGAL RESPONSES TO RELIGIOUS PRACTICES IN THE UNITED STATES 249, 249–50 (Austin Sarat ed., 2012). For responses, see Andrew Koppelman, “Freedom of the Church” and the Authority of the State, 21 J. CONTEMP. LEGAL ISSUES 145, 146 (2013), and Richard C. Schragger & Micah Schwartzman, *Lost in Translation: A Dilemma for Freedom of the Church*, 21 J. CONTEMP. LEGAL ISSUES 15, 16 (2013).

<sup>9</sup> 134 S. Ct. 2751, 2769 (2014).

<sup>10</sup> *Id.* at 2759.

<sup>11</sup> See, e.g., R. H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937) (setting out this theory of the firm); see also Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structures*, 3 J. FIN. ECON. 305, 311 (1976) (discussing corporation as nexus of contracts).

<sup>12</sup> Michael A. Helfand & Barak D. Richman, *The Challenge of Co-Religionist Commerce*, 64 DUKE L.J. 769, 778 (2015) (observing that “tensions between religious exercise and commercial objectives stand at the center of some of the most foundational church–state debates in the United States”); Nathan B. Oman, *The Need for a Law of Church and Market*, 64 DUKE L.J. ONLINE 141, 143 (2015) (“[W]e lack a clear set of theories and metaphors specifying what role, if any, religion should play in commerce.”).

Using healthcare as its case study, this Article argues that when religion and commerce combine, commercial transactions shape religious compliance and identity. As religious identity spreads through contract, “religious” institutions far removed from the paradigm of the church populate the marketplace. Secular, for-profit, and government institutions can become religious and eligible for legislative and judicial exemptions from regulation. This contracting of religion—the rise of zombie religious institutions in particular—exposes the weakness in the theory of religious institutionalism, which would allow institutions the authority to define their boundaries and the autonomy to avoid state regulation. As ever-wider categories of institutions become eligible for exemption, the concept of a religious institution comes under strain.

Part I of the Article describes an important phenomenon: private law has worked to create religious compliance—sometimes in perpetuity—in facilities that are not, or never have been, religious and by providers who do not share the institution’s religious precepts. This Article looks to the experience of healthcare because the religious hospital has long served as the exemplar of the religious institution flourishing in commerce.<sup>13</sup> Through contract, healthcare facilities identified as secular, affiliated with other faiths, or operated as public hospitals assume new religious obligations and privileges. Healthcare systems with names like “Optima” and hospitals with names like “Daniel Freeman Marina Hospital” come to require providers’ obedience to religious doctrine.<sup>14</sup> Distinctions between secular and religious, public and private, and nonprofit and for-profit no longer hold.

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<sup>13</sup> Helen M. Alvaré, *Religious Freedom Versus Sexual Expression: A Guide*, 30 J.L. & RELIGION 475, 483, 485–86 (2015) (discussing hospitals as exemplars of Catholic religious institutions and ministry); Kent Greenawalt, *Objections in Conscience to Medical Procedures: Does Religion Make a Difference?*, 2006 U. ILL. L. REV. 799, 824 (“Although it is somewhat difficult to say what gives a collective entity an objection in conscience, we do understand that a hospital that is run by a religious group has a powerful reason not to allow actions on its premises that the religion regards as murder or as another serious moral wrong.”); Ana Smith Iltis, *Institutional Integrity in Roman Catholic Health Care Institutions*, 7 CHRISTIAN BIOETHICS 95, 98–102 (2001) (addressing concerns about integrity of Catholic healthcare institutions as they face the challenges of a secular, pluralistic, market-driven economy); Roger Severino, *Or for Poorer? How Same-Sex Marriage Threatens Religious Liberty*, 30 HARV. J.L. & PUB. POL’Y 939, 964 (2007) (listing hospitals as among “religious institutions [that] have enjoyed wide latitude in choosing which religiously motivated services and facilities to provide and to whom they will be provided”); Susan J. Stabile, *When Conscience Clashes with State Law and Policy: Catholic Institutions*, 46 J. CATH. LEGAL STUD. 137, 144 (2017) (“[W]hen a Catholic organization cares for the elderly or the sick, or provides for education, it is performing an act as religious as those that take place inside a church building.”).

<sup>14</sup> RELIAS, *Health System Bans Abortions in Facilities*, MED. ETHICS ADVISOR (Apr. 1, 1998), <https://www.ahcmedia.com/articles/59254-health-system-bans-abortions-in-facilities> [<https://perma.cc/29F4-LDZN>] (reporting that, following the merger of Catholic Medical Center and Elliot Hospital into Optima Healthcare, abortion was prohibited at both facilities); *see also* *Brownfield v.*

The expansion of religious restrictions and identity is not limited to ongoing relationships between religious and secular institutions. By the terms of their sales, formerly religious hospitals maintain a religious identity. In other instances, hospitals lose their religious affiliation after sale but continue their compliance with religious rules. Zombie religious hospitals—removed of the leadership or mission that might have given them special status as religious institutions—carry on.

Part II contends that private law impedes public policy by expanding the universe of institutions eligible for religious exemption from law. The growing number of institutions adopting religious identity belies a fundamental assumption of legislative and judicial exemptions: that religious objections will not be so numerous or categorical as to thwart the state's goals. To the extent that contracts of religious compliance demand behavior below standards set by generally applicable laws, they do not promote corporate social responsibility but instead effectively immunize secular, for-profit, and government institutions from employee and consumer protections.

Part III argues that the combination of commerce and religion destabilizes the theory of religious institutionalism that seemed triumphant after *Hosanna-Tabor* and *Hobby Lobby*. Religious institutionalists ground their claims to broad institutional autonomy from regulation on values of pluralism and voluntarism. According to this view, robust institutional protection leads to the flourishing of diverse institutions, alternative sources of authority, and individual liberty. But in the marketplace, powerful economic entities may reduce pluralism, both religious and secular. Institutions gain faith through commercial transaction instead of organic development. They unite individuals through contract, not devotion. In this way, the healthcare market realizes fears articulated by several courts in the 1980s that, having been granted religious exemptions, religious institutions might “extend their influence and propagate their faith by entering the commercial, profit-making world.”<sup>15</sup>

Contracting religion—and the zombie institutions it generates—makes the crisis acute. As religious institutions blur the lines between for-profit and nonprofit, commercial and noncommercial, and sacred and secular, the category of religious institution loses its specialness. Any institution can

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Daniel Freeman Marina Hosp., 256 Cal. Rptr. 240, 242 (Cal. Ct. App. 1989) (considering claim by rape victim against Catholic hospital for denying emergency contraception and counseling).

<sup>15</sup> Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 337 (1987) (dismissing this concern of the district court); see also King's Garden, Inc. v. FCC, 498 F.2d 51, 55 (D.C. Cir. 1974) (noting that Title VII's religious employer exemption “is a sure formula for concentrating and vastly extending the worldly influence of those religious sects having the wealth and inclination to buy up pieces of the secular economy”).

become religious. Under such circumstances, courts may replace their hands-off approach to religious identity and doctrine with more searching and skeptical analysis. Legislatures may revisit and rethink the enterprise of institutional exemption. In so doing, they may reduce the liberty that the doctrine grants to religious institutions and perhaps to religious exercise more broadly.

### I. THE MARKET FOR RELIGIOUS COMPLIANCE AND IDENTITY

This Part argues that commercial transactions are creating religious institutions far removed from the paradigm of church or religious association. This account focuses on healthcare, due to the degree to which the sector has combined religion and commerce, and on Catholic healthcare in particular, due to its large market share and extensive religious requirements. It illuminates three orders of institutions: original religious institutions, contracting partners or affiliates, and zombie religious institutions. While churches are uncontestedly first-order institutions, officially designated religious nonprofit hospitals have long been considered exemplars of religious institutionalism. As Section I.A describes, these original institutions themselves have changed in commerce and have become largely indistinguishable from their secular competitors. Further along the spectrum, as Section I.B shows, we find contracting partners engaged in a variety of ongoing relationships with religious institutions. Mergers, joint ventures, and partnerships commit institutions that are public, secular, or affiliated with other faiths to comply with Catholic doctrine. Finally, as Section I.C argues, provisions in sales contracts and restrictive covenants in deeds perpetuate religious identity in formerly Catholic facilities long after ownership has changed. Zombie religious institutions emerge, even as the justifications for religious identity—the affiliation with a religious body or the religious beliefs of founders, directors, or employees—no longer remain.

#### *A. Evolution of Catholic Healthcare Institutions*

The healthcare landscape includes many faith traditions, including Orthodox Jewish nursing homes, Christian Science centers, Presbyterian hospitals, and more. Catholic healthcare, however, dwarfs all other religious healthcare providers combined. In a market where approximately 59% of hospitals are nonprofit, Catholic healthcare systems are four of the ten largest nonprofit systems.<sup>16</sup> There are 548 officially designated Catholic hospitals,

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<sup>16</sup> LOIS UTTLEY & CHRISTINE KHAIKIN, MERGERWATCH, GROWTH OF CATHOLIC HOSPITALS AND HEALTH SYSTEMS: 2016 UPDATE OF THE MISCARRIAGE OF MEDICINE REPORT 2, 8 (2016), <http://static1.1.sqspcdn.com/static/f/816571/27061007/1465224862580/M> [<https://perma.cc/DDK4->

which constitute approximately 14.5% of the national market<sup>17</sup> but over 40% of acute care beds in five states and over 30% in five other states.<sup>18</sup>

Officially designated Catholic hospitals have a sponsoring religious order and identify as an extension of the Church.<sup>19</sup> They require governance and provision of care in accordance with the Ethical and Religious Directives for Catholic Health Care Services (ERDs).<sup>20</sup> According to these directives, a Catholic institution must “distinguish itself by service” to those in need, act as “a responsible steward of the health care resources available to it,” and “treat its employees respectfully and justly,” including through “just compensation and benefits” and “recognition of the rights of employees to organize and bargain collectively without prejudice to the common good.”<sup>21</sup>

Within Catholic healthcare facilities, all providers must comply with religious restrictions on care.<sup>22</sup> Assisted reproductive technology, abortion, contraception, condoms, sterilization, and treatments derived from fetal tissue or embryonic stem cells are not permitted.<sup>23</sup> Under the ERDs, patients may only be informed of “morally legitimate alternatives.”<sup>24</sup> And where patients have made a decision about the use or withdrawal of artificial life support, their wishes will not be honored if they are contrary to Catholic teaching.<sup>25</sup>

These modern Catholic healthcare facilities are frequently considered first-order religious institutions, not unlike churches or church-run charities. Today, however, they bear little resemblance to such noncommercial religious entities. In the early days of Catholic healthcare, women religious provided nursing care and served as administrators, overseeing daily

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HMUB]. Catholic healthcare has 1600 long-term and other health facilities. *About CHA*, CATHOLIC HEALTH ASS'N OF THE U.S., <https://www.chausa.org/about> [<https://perma.cc/33TK-RVE3>].

<sup>17</sup> UTTLEY & KHAIKIN, *supra* note 16, at 1, 3.

<sup>18</sup> *Id.* at 1.

<sup>19</sup> See J. Stuart Showalter & John L. Miles, *Restructuring Health Care Organizations While Retaining Recognition as a Catholic Institution*, 32 ST. LOUIS U. L.J. 1111, 1125–26, 1131 (1988).

<sup>20</sup> See U.S. CONFERENCE OF CATHOLIC BISHOPS, ETHICAL AND RELIGIOUS DIRECTIVES FOR CATHOLIC HEALTH CARE SERVICES (5th ed. 2009), <http://www.usccb.org/issues-and-action/human-life-and-dignity/health-care/upload/Ethical-Religious-Directives-Catholic-Health-Care-Services-fifth-edition-2009.pdf> [<https://perma.cc/WM2L-WL4X>] [hereinafter ERDs].

<sup>21</sup> *Id.* at 11–12 (ERDs 1, 3, 6, and 7).

<sup>22</sup> *Id.* at 12 (“Catholic health care services must adopt these Directives as policy [and] require adherence to them within the institution as a condition for medical privileges and employment . . .”).

<sup>23</sup> See *id.* at 25–27, 33 (ERDs 38–41, 45, 48, 52, 53, and 66).

<sup>24</sup> *Id.* at 20 (ERD 27).

<sup>25</sup> See *id.* at 31 (“The free and informed judgment made by a competent adult patient concerning the use or withdrawal of life-sustaining procedures should always be respected and normally complied with, unless it is contrary to Catholic moral teaching.”). With regard to artificial nutrition and hydration, the ERDs impose “an obligation to provide patients with food and water,” even when they are in “chronic and presumably irreversible conditions.” *Id.* (ERD 58).

operations.<sup>26</sup> Hospitals would operate as charities, providing care to the poor and securing financing from private donations.<sup>27</sup> Over the course of the last century, this model of religious healthcare institution—owned, operated, and directed by women religious—disappeared.

By the mid-twentieth century, with scientific advances in antisepsis and new funding from private health insurance and federal financing, Catholic healthcare institutions no longer primarily served charity patients or depended on donations.<sup>28</sup> The enactment of Medicare and Medicaid in 1965 cemented these changes.<sup>29</sup> Today, virtually all funding of Catholic healthcare comes from government funds and private insurers.<sup>30</sup> In terms of sophistication of care, competition over prices, and levels of charitable care, Catholic hospitals resemble their secular nonprofit and for-profit competitors.<sup>31</sup>

As vocations of women religious declined, the staffing and governance of Catholic healthcare also evolved. Members of religious orders came to have little to no patient interaction and to sponsor “systems in markets in which they no longer have—or never did have—an active presence.”<sup>32</sup> Hospitals that had existed as parts of their sponsoring religious organizations

<sup>26</sup> See Barbra Mann Wall, *The Role of Catholic Nurses in Women’s Health Care Policy Disputes: A Historical Study*, 61 NURSING OUTLOOK 367, 368 (2013) (“[T]he overwhelming majority of Catholic hospitals in America were established and originally managed by women.”).

<sup>27</sup> See BARBRA MANN WALL, AMERICAN CATHOLIC HOSPITALS: A CENTURY OF CHANGING MARKETS AND MISSIONS 9 (2011).

<sup>28</sup> See Showalter & Miles, *supra* note 19, at 1117–19.

<sup>29</sup> See Donald H.J. Hermann, *Religiously Affiliated Health Care Providers: Legal Structures and Transformations*, in RELIGIOUS ORGANIZATIONS IN THE UNITED STATES: A STUDY OF IDENTITY, LIBERTY, AND THE LAW 727, 727 (James A. Serritella et al. eds., 2006).

<sup>30</sup> LOIS UTTLEY & RONNIE PAWELKO, MERGERWATCH, NO STRINGS ATTACHED: PUBLIC FUNDING OF RELIGIOUSLY-SPONSORED HOSPITALS IN THE UNITED STATES 13, 15 (2002), [http://www.mergerwatch.org/storage/pdf-files/bp\\_no\\_strings.pdf](http://www.mergerwatch.org/storage/pdf-files/bp_no_strings.pdf) [<https://perma.cc/ET8E-V9P6>] (finding that in one representative state, charitable donations amounted to 0.0015% of revenue for religious hospitals).

<sup>31</sup> See, e.g., CATHOLIC HEALTH ASS’N OF THE U.S., CATHOLIC HEALTH CARE IN THE UNITED STATES 1 (Jan. 2013), [https://www.chausa.org/docs/default-source/general-files/mini\\_profile-pdf](https://www.chausa.org/docs/default-source/general-files/mini_profile-pdf) [<https://perma.cc/99Z2-H2XW>] (showing a similar service mix at Catholic and other nonprofit hospitals with the exception of a few services, including palliative care, that are more common in Catholic hospitals); LOIS UTTLEY ET AL., MERGERWATCH & ACLU, MISCARRIAGE OF MEDICINE: THE GROWTH OF CATHOLIC HOSPITALS AND THE THREAT TO REPRODUCTIVE HEALTH CARE 12–13 (Dec. 2013), <https://www.aclu.org/sites/default/files/assets/growth-of-catholic-hospitals-2013.pdf> [<https://perma.cc/P529-Q2TW>] (reporting that Catholic-sponsored and -affiliated hospitals provide disproportionately less charity care than do public hospitals and other religious nonprofit hospitals and less care for Medicaid patients than any other type of hospital); Ann Kutney-Lee et al., *Distinct Enough? A National Examination of Catholic Hospital Affiliation and Patient Perceptions of Care*, 39 HEALTH CARE MGMT. REV. 134, 134 (2014) (reporting that “patients treated in Catholic hospitals appear to rate their hospital experience similar to patients treated in non-Catholic hospitals”).

<sup>32</sup> Lawrence E. Singer, *Does Mission Matter?*, 6 HOUS. J. HEALTH L. & POL’Y 347, 348 (2006).

formed separate corporate entities.<sup>33</sup> Laypeople became directors and administrators of these hospitals.<sup>34</sup>

In the absence of shared religious ties to personnel, formal mechanisms of control were put in place. In Catholic hospital structures, the religious orders frequently remained members of the nonprofit corporation and retained authority over fundamental corporate changes—including anything affecting religious mission—but boards of directors exercised general governance authority and oversight.<sup>35</sup> Local bishops assumed a greater role in supervising healthcare institutions and policing compliance with the ERDs in response (at least partly) to the lack of religious administrators and staff.<sup>36</sup>

### B. Spread of Religion to Non-Catholic Healthcare

Over the past few decades, Catholic healthcare systems have increased in size and scope by acquiring, affiliating with, and merging with non-Catholic hospitals and other facilities.<sup>37</sup> Whereas Catholic hospitals merged with one another in the 1980s, they became willing to deal with non-Catholic hospitals as a new wave of consolidation swept the nation in the 1990s.<sup>38</sup> Over the course of that decade, 171 mergers (and many affiliations) took place between Catholic and non-Catholic hospitals.<sup>39</sup> After its enactment in 2010, the Affordable Care Act fueled another frenzy of consolidation.<sup>40</sup>

These commercial transactions have blurred the lines between religious and nonreligious entities. In a merger or acquisition, the Catholic and non-Catholic hospitals become a single entity.<sup>41</sup> This entity may or may not be

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<sup>33</sup> Michael J. DeBoer, *Religious Hospitals and the Federal Community Benefit Standard—Counting Religious Purpose as a Tax-Exemption Factor for Hospitals*, 42 SETON HALL L. REV. 1549, 1565–66 (2012).

<sup>34</sup> WALL, *supra* note 27, at 5.

<sup>35</sup> DeBoer, *supra* note 33, at 1566.

<sup>36</sup> Leonard J. Nelson, III, *God and Woman in the Catholic Hospital*, 31 J. LEGIS. 69, 124 (2004).

<sup>37</sup> UTTLEY ET AL., *supra* note 31, at 4 (documenting mergers from 2001 to 2011); WALL, *supra* note 27, at 19 (discussing the merger trend of the 1990s); Kathleen M. Boozang, *Deciding the Fate of Religious Hospitals in the Emerging Health Care Market*, 31 HOUS. L. REV. 1429, 1434 (1995) (“Although the 1980s witnessed many mergers among Catholic facilities, the realities of the 1990s have necessitated the consolidation of Catholic with non-Catholic facilities.”).

<sup>38</sup> Carol S. Weisman et al., *The Implications of Affiliations Between Catholic and Non-Catholic Health Care Organizations for Availability of Reproductive Health Services*, 9 WOMEN’S HEALTH ISSUES 121, 126–27 (1999).

<sup>39</sup> Rachel Benson Gold, *Hierarchy Crackdown Clouds Future of Sterilization, EC Provision at Catholic Hospitals*, GUTTMACHER POL’Y REV., May 2002, at 11, 11 <http://www.guttmacher.org/pubs/tgr/05/2/gr050211.pdf> [<http://perma.cc/6FSB-JF44>].

<sup>40</sup> Leemore Dafny, *Hospital Industry Consolidation — Still More to Come?*, 370 NEW ENG. J. MED. 198, 198 (2014).

<sup>41</sup> Kenneth R. White, *Hospitals Sponsored by the Roman Catholic Church: Separate, Equal, and Distinct?*, 78 MILBANK Q. 213, 227–28 (2000).

Catholic. The non-Catholic hospital likewise may be officially designated as Catholic<sup>42</sup> or may keep its non-Catholic identity. Irrespective of the designation, mergers invariably result in secular entities abiding by Catholic doctrine.<sup>43</sup> Similarly, joint ventures in which both parties contribute capital to create a new separate entity or line of business may require that the joint venture adopt a religious identity.<sup>44</sup>

In looser affiliations like partnerships, management agreements, or leases, each healthcare corporation typically maintains its own identity.<sup>45</sup> The Catholic partner has no ownership stake in the partnering facility, lessee, or joint venturer. Yet these healthcare facilities denominated as secular, identified with a non-Catholic religion, or considered public have agreed to Catholic religious restrictions on care.

Joint efforts may result in system-wide religious restrictions. For example, in the mid-1990s, secular Elliot Hospital entered into a partnership called Optima Health with Catholic Medical Center in Manchester, New Hampshire.<sup>46</sup> Despite promises to doctors that all treatments could continue at Elliot, Optima banned abortions to comply with the directives.<sup>47</sup> Similarly, in order for two Catholic hospitals to participate in a regional consortium in St. Petersburg, Florida, the six nonsectarian hospitals reportedly had to ban abortion, in vitro fertilization, and sterilization and permit a nun to review their end-of-life policies.<sup>48</sup>

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<sup>42</sup> Weisman et al., *supra* note 38, at 125 (providing examples).

<sup>43</sup> See LIZ BUCAR, CATHOLICS FOR A FREE CHOICE, WHEN CATHOLIC AND NON-CATHOLIC HOSPITALS MERGE: REPRODUCTIVE HEALTH COMPROMISED 33–50 (1998), <http://www.catholicsforchoice.org/wp-content/uploads/2014/01/1998reprohealthcompromised.pdf> [<http://perma.cc/7J58-84WB>] (documenting many mergers between 1990 and 1997 resulting in non-Catholic hospital discontinuing services); Weisman et al., *supra* note 38, at 132–33 (reporting the end of abortion care in case studies, none of which “involved an instance of a non-Catholic organization assuming Catholic identity as a result of affiliation” or the merger of Catholic and non-Catholic organizations into a Catholic entity); Carol M. Ostrom, *Hospitals’ Proposed Affiliation with Catholic Systems Opposed*, SEATTLE TIMES (published Apr. 27, 2013, 8:00 PM; updated Apr. 27, 2013, 10:01 PM), <http://www.seattletimes.com/seattle-news/hospitalsrsquo-proposed-affiliation-with-catholic-systems-opposed> [<http://perma.cc/6ZKD-ZAA8>] (reporting that after acquisition by Catholic Franciscan, Highline Medical Center in Washington remained secular but subject to the ERDs).

<sup>44</sup> Therese Cox, *Sisters to Establish Charity Foundation with Profits*, CHARLESTON DAILY MAIL, Mar. 5, 1996, at 04D (reporting that a fifty–fifty joint venture between St. Joseph’s Hospital and for-profit Columbia/HCA resulted in a ban on abortions and sterilizations within the jointly owned facility).

<sup>45</sup> UTTLEY ET AL., *supra* note 31, at 16; Weisman et al., *supra* note 38, at 123.

<sup>46</sup> Alison Manolovici Cody, *Success in New Jersey: Using the Charitable Trust Doctrine to Preserve Women’s Reproductive Services When Hospitals Become Catholic*, 57 N.Y.U. ANN. SURV. AM. L. 323, 344–45 (2000).

<sup>47</sup> *Id.*

<sup>48</sup> Wes Allison & Bryan Gilmer, *Bayfront to Leave BayCare*, ST. PETERSBURG TIMES (Oct. 24, 2000), [http://www.sptimes.com/News/102400/TampaBay/Bayfront\\_to\\_leave\\_Bay.shtml](http://www.sptimes.com/News/102400/TampaBay/Bayfront_to_leave_Bay.shtml) [<http://perma.cc/GU2T-AWTK>].

Religious–religious affiliations also generate compliance with Catholic rules by non-Catholic partners. For example, Hoag Presbyterian Hospital in Newport Beach, California, entered into an agreement with St. Joseph Health System to integrate care across their hospitals.<sup>49</sup> The transaction purported to maintain the partners’ respective faith identities. But, shortly thereafter, Hoag announced a halt to nontherapeutic abortions.<sup>50</sup> Similarly, when three Baptist hospitals in Nashville, Tennessee, affiliated with St. Thomas hospitals, the parties committed to “respect and preserve the heritage, mission and values of both faith-based organizations.”<sup>51</sup> Yet the Baptist hospitals agreed to offer only medical services “consistent with Catholic canonical law.”<sup>52</sup> For the next eleven years, “Baptist Hospital” of Nashville operated under the ERDs.<sup>53</sup>

Public hospitals also have come under religious restrictions when they affiliate, however loosely, with a religious hospital or healthcare system.<sup>54</sup> In Washington, a number of public health districts have partnered with Catholic healthcare systems. In San Juan County, one such district replaced the public clinic and hospital with a new facility run under contract with the district by Catholic PeaceHealth.<sup>55</sup> Although the public district covered one-third of its construction costs and uses property taxes to partially subsidize its operations, Peace Island Medical Center restricts services according to

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<sup>49</sup> Jill Cowan, *Hoag Hospital Can Refuse Elective Abortions, State Rules*, L.A. TIMES: L.A. NOW (Apr. 4, 2014, 3:45 PM), <http://www.latimes.com/local/lanow/la-me-ln-hoag-abortions-20140404-story.html> [<http://perma.cc/YW68-JHDG>].

<sup>50</sup> *Id.*

<sup>51</sup> Nicki Pendleton Wood, *Letter Confirms Baptist Planned Sale to St. Thomas and Ascension Health*, NASHVILLEPOST.COM (May 7, 2001), [https://www.nashvillepost.com/news/2001/5/6/letter\\_confirms\\_baptist\\_planned\\_sale\\_to\\_st\\_thomas\\_and\\_ascension\\_health](https://www.nashvillepost.com/news/2001/5/6/letter_confirms_baptist_planned_sale_to_st_thomas_and_ascension_health) [<https://perma.cc/2PNC-SCFX>].

<sup>52</sup> *Id.*

<sup>53</sup> *See St. Thomas Health Renaming Baptist, Other Hospitals*, WSMV (published July 11, 2013, 5:20 AM; updated July 25, 2013, 5:20 AM), <http://www.wsmv.com/story/22812676/st-thomas-expected-to-rename> [<https://perma.cc/XT3Y-7LLQ>].

<sup>54</sup> UTTLEY ET AL., *supra* note 31, at 16. Management contracts may involve religious–public partners as well. *See, e.g.*, Michael Romano, *Healthcare Hath No Fury*, MOD. HEALTHCARE, July 21, 2003, 6, 6 (noting that Baptist Health Systems of Alabama split ownership of Cullman Regional Medical Center fifty–fifty with the Health Care Authority of Cullman County); Shannon Muchmore, *Mercy Health System Chosen to Manage OSU Medical Center*, TULSA WORLD (Apr. 1, 2014), [http://www.tulsaworld.com/news/health/mercy-health-system-chosen-to-manage-osu-medical-center/article\\_ec04df9d-75bb-5db6-ad83-a1a89376fb9f.html](http://www.tulsaworld.com/news/health/mercy-health-system-chosen-to-manage-osu-medical-center/article_ec04df9d-75bb-5db6-ad83-a1a89376fb9f.html) [<https://perma.cc/6B6C-TR8J>] (reporting that a Catholic healthcare system will manage Oklahoma State University Medical Center, “the primary hospital for Tulsa’s indigent residents” with 25,000 patient visits annually).

<sup>55</sup> Aaron Corvin, *ACLU Says Faith-Based Hospitals Jeopardize Reproductive, End-of-Life Care*, COLUMBIAN (Mar. 23, 2013, 5:00 PM), <http://www.columbian.com/news/2013/mar/24/ACLU-faith-based-hospitals-jeopardize-care> [<https://perma.cc/U3WZ-WSED>].

religious doctrine.<sup>56</sup> In Austin, Texas, a Catholic hospital entered into a lease and management contract with Brackenridge, the public hospital primarily responsible for the city's indigent care.<sup>57</sup> The lease agreement made clear that Brackenridge would retain ownership and the facility would not be identified as Catholic.<sup>58</sup> Nevertheless, it requires the public hospital to turn away women seeking emergency contraception and refer them to a public clinic instead.<sup>59</sup> Other proposed public–Catholic hospital affiliations have fallen apart due to concerns over healthcare access and Establishment Clause limitations.<sup>60</sup>

### C. *Development of Zombie Catholic Hospitals*

Religious identity can survive even after commercial relationships end. As hospitals have been sold, religious identity has persisted. Provisions in asset purchase agreements and restrictive covenants in deeds continue religious identity and/or restrictions after a facility has changed hands from a Catholic seller to a secular (and frequently for-profit) buyer. In a phenomenon that seems to date to the 1990s, hospitals maintain their religious identity under the terms of sales agreements.<sup>61</sup> These zombie Catholic hospitals claim Catholic identity even as they further no charitable mission, grant no role to religious orders, and have no Catholic ownership. In other instances, zombie hospitals have no Catholic identity but continue to comply with religious rules.<sup>62</sup>

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<sup>56</sup> *Id.*

<sup>57</sup> Barbra Mann Wall, *Conflict and Compromise: Catholic and Public Hospital Partnerships*, 18 NURSING HIST. REV. 100–01 (2010).

<sup>58</sup> *Id.* at 101.

<sup>59</sup> *Id.* at 110–11.

<sup>60</sup> *See, e.g.*, OFFICE OF THE ATT'Y GEN. OF KY., PROPOSED CONSOLIDATION OF JEWISH HOSPITAL HEALTHCARE SERVICES, INC.: REPORT OF THE KENTUCKY ATTORNEY GENERAL 10, 13 (2011), [hereinafter REPORT OF THE KENTUCKY ATTORNEY GENERAL] <http://www.modernhealthcare.com/Assets/pdf/CH769761230.PDF> [<https://perma.cc/42X8-W6H5>] (expressing constitutional and policy concerns over proposed affiliation between University Medical Center of the public University of Louisville and a Catholic system because although the public entities would not be “identified or treated as a ‘Catholic’ institution” they agreed to prohibit services in accordance with religious directives); Arthur B. LaFrance, *Merger of Religious and Public Hospitals: Render unto Caesar*, 3 SEATTLE J. SOC. JUST. 229 (2004) (recounting litigation over the proposed merger of a governmental hospital district—a municipal corporation operating a hospital and several clinics—in Oregon and Catholic Providence Health System, with the agreement committing the parties to respect the ERDs).

<sup>61</sup> BUCAR, *supra* note 43, at 49–50 (documenting ten sales resulting in zombie Catholic hospitals from 1990 to 1997).

<sup>62</sup> *See, e.g.*, Cinda Becker, *Pennsylvania Pacts: Catholic Health East Agrees to Sell Pair of Hospitals*, MOD. HEALTHCARE (Nov. 19, 2007), <http://www.modernhealthcare.com/article/20071119/MAGAZINE/71116003> [<https://perma.cc/EW2L-9274>] (reporting on the purchase of Mercy Jeannette by secular Excelsa Health, according to which the hospital will be renamed Excelsa Health Westmoreland Hospital but follow Catholic teachings).

The primary reason that religious compliance persists is that Catholic sellers take the position that at least some commitment to restrictions from buyers is nonnegotiable.<sup>63</sup> Asset purchase agreements incorporate the ERDs as provisions enforceable like any other contract term.<sup>64</sup> The agreements often require decades or an eternity of compliance.<sup>65</sup>

The new owners of formerly religiously affiliated facilities often have no religious or moral objection to these health services. Indeed, they may provide them at other facilities. They agree to the provisions for a variety of reasons. First, they may value the religious name—whose use is contingent on maintaining religious restrictions or identity. Second, some for-profit chains embrace religious compliance to break into a new market.<sup>66</sup> Third, some buyers may welcome having a reason to prohibit performance of procedures that invite controversy in particular markets. Fourth, as Part II will show, buyers may also benefit financially from prior or ongoing religious exemptions.

An intriguing possibility also exists that non-Catholic buyers may receive a discount for credible commitment to ERDs. Catholic nonprofits previously paid substantially less to purchase a Catholic hospital than would for-profit or other nonprofit buyers.<sup>67</sup> This selective discounting, researchers hypothesized, could be explained by the fact that Catholic buyers “can

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<sup>63</sup> See Spencer L. Durland, Note, *The Case Against Institutional Conscience*, 86 NOTRE DAME L. REV. 1655, 1665 (2011) (“Reverend F. Patrick Hanser stated the position as follows: ‘If we would have had to compromise any of our ethical or religious values or our Catholic identity, it would have been better for us to close.’”); see also *infra* notes 256, 258.

<sup>64</sup> CATHOLICS FOR A FREE CHOICE, MERGER TRENDS 2001: REPRODUCTIVE HEALTH CARE IN CATHOLIC SETTINGS 11, 12 (2002), <https://www.catholicsforchoice.org/topics/healthcare/documents/2001mergertrends.pdf> [<https://perma.cc/92JX-HJYA>] (documenting sales of thirteen Catholic hospitals to for-profit healthcare systems with agreements to continued compliance with ERDs); SUSAN BERKE FOGEL, MERGERWATCH, FIGHTING RELIGIOUS HEALTH RESTRICTIONS: PREVENTING THE CONTINUATION OF RESTRICTIONS WHEN RELIGIOUS HOSPITALS ARE SOLD 3 (2004), <http://static1.1.sqspcdn.com/static/f/816571/11352513/1300824208687/b> [<https://perma.cc/5MCB-EP7S>] (documenting an additional seven such sales).

<sup>65</sup> See FOGEL, *supra* note 64, at 10 (sale of Santa Marta Hospital to for-profit Star Healthcare Group required adherence to the ERDs for 30 years); *id.* at 4 (“According to Richard Fiske of Tenet Healthcare, most of the Tenet agreements with Catholic hospitals continue the *Directives* in perpetuity.”).

<sup>66</sup> Melanie Evans, *Exiting Two States[:]* *Catholic Health Partners Sheds Hospitals, Debt*, MOD. HEALTHCARE (May 9, 2011), <http://www.modernhealthcare.com/article/20110509/MAGAZINE/305099964> [<https://perma.cc/Q2BF-D8EY>] (explaining that in acquiring a Catholic hospital chain, for-profit Health Management Associates would gain a major market and complete its largest acquisition thus far).

<sup>67</sup> Paul Gertler & Jennifer Kuan, *Does It Matter Who Your Buyer Is? The Role of Nonprofit Mission in the Market for Corporate Control of Hospitals*, 52 J.L. & ECON. 295, 302 (2009) (finding that “religious nonprofits discount only to religious buyers” with a discount of about 48% and interpreting “this differential discounting to mission, where, for example, a Catholic hospital selling to another Catholic hospital can be confident that abortions will not be performed”).

credibly commit to not performing abortions and other related actions”); the discount thus was “the value to the Catholic seller of a broad set of hard-to-contract behaviors.”<sup>68</sup> Today, however, Catholic sellers tend to contract with secular buyers for precisely these behaviors.<sup>69</sup> A recent empirical study suggests that zombie Catholic hospitals may be commonplace; looking across representative states, it found that the rate of performance of tubal ligations—a procedure largely barred by the ERDs—did not increase after Catholic hospitals were sold to non-Catholic buyers.<sup>70</sup>

For-profit buyers have agreed not only to continue Catholic restrictions but also to assume the mantle of Catholic identity.<sup>71</sup> Since the mid-1990s, some for-profit systems—including Tenet Healthcare and Columbia/HCA Healthcare—have adopted a strategy of actively marketing themselves as willing to preserve religious identity in formerly Catholic facilities.<sup>72</sup> Today, for example, publicly traded Hospital Corporation of America holds out several of its hospitals as part of the ministry of the Roman Catholic Church.<sup>73</sup>

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<sup>68</sup> *Id.* at 296–97; see also Alan J. Meese & Nathan B. Oman, Hobby Lobby, *Corporate Law, and the Theory of the Firm: Why For-Profit Corporations Are RFRA Persons*, 127 HARV. L. REV. F. 273, 293 (2014) (“Counter-parties may rely on religious observance as a low-cost signal of trustworthiness. To be sure, the frequency of religious affinity fraud suggests that religion also can be used opportunistically, but in many situations it is sufficiently accurate to be a rational response to more expensive systems of sorting and monitoring.”).

<sup>69</sup> Other faith traditions also contract to keep the religious identity of their hospitals alive following a sale. For example, Parkview Adventist Medical Center in Maine accepted an offer of acquisition from nonsectarian Mid Coast Health Services because it committed to “ensuring the faith-based care continue” and to abiding by an “Adventist culture and value system.” Beth Brogan, *Brunswick Hospital Leaders Laud Merger*, BANGOR DAILY NEWS (Aug. 21, 2015, 4:35 PM), <http://bangordailynews.com/2015/08/21/business/brunswick-hospital-leaders-laud-merger> [https://perma.cc/3EFF-AFLA]. Likewise, some formerly Baptist hospitals operate in accordance with Baptist faith and require Baptist representation on their boards. See, e.g., Romano, *supra* note 54.

<sup>70</sup> Elaine L. Hill et al., *Medically Necessary but Forbidden: Reproductive Health Care in Catholic-Owned Hospitals* 12 (Nat’l Bureau of Econ. Research, Working Paper No. 23768, 2017), <http://www.nber.org/papers/w23768.pdf> [https://perma.cc/78ZN-LSMR].

<sup>71</sup> Lisa Wangsness, *Worcester’s For-Profit St. Vincent May Offer Peek at Boston Hospital’s Future*, TELEGRAM.COM (published Apr. 28, 2010, 9:36 AM; updated April 28, 2010, 1:26 PM), <http://www.telegram.com/article/20100428/NEWS/100429713&Template=printart> [https://perma.cc/993S-BXBU] (discussing for-profit health systems’ purchases of Catholic hospitals and maintenance of “religious identity”); see *supra* notes 20–25 and accompanying text for the requirements of officially designated Catholic hospitals.

<sup>72</sup> Susan Berke Fogel & Lourdes A. Rivera, *Saving Roe Is Not Enough: When Religion Controls Healthcare*, 31 FORDHAM URB. L.J. 725, 731 (2004) (noting Tenet’s strategy); Lisa C. Ikemoto, *When a Hospital Becomes Catholic*, 47 MERCER L. REV. 1087, 1094–95 (1996) (quoting a Columbia executive as saying, “As the Catholic hospitals see Columbia as a joint-venture partner, they’ll want to have deals where Rick (Scott, Columbia’s president and chief executive officer) and the pope have an equal vote”).

<sup>73</sup> Gail Bulfin, *Mercy Hospital to Be Sold to HCA Chain*, ARCHDIOCESE OF MIAMI (July 23, 2010), [http://www.miamiarch.org/CatholicDiocese.php?op=Article\\_10713125945323](http://www.miamiarch.org/CatholicDiocese.php?op=Article_10713125945323) [https://perma.cc/6CA2-9DHZ].

The result has been a peculiar institution: the for-profit, investor-owned Catholic hospital.<sup>74</sup> For example, after its sale to private equity firm Cerberus Capital Management, the six-hospital Caritas Christi Health Care system in Boston will maintain not only compliance with the ERDs but also official designation as Catholic.<sup>75</sup> Describing the agreement, the *Wall Street Journal* remarked, “Catholic nuns, meet your new owners: A three-headed dog from hell.”<sup>76</sup> Sales of other hospitals to investment firms similarly have preserved their official Catholic designation.<sup>77</sup>

Agreements for monitoring by local Catholic clergy have been concluded as part of these sales.<sup>78</sup> For example, parallel to the purchase agreement with Caritas, Steward (the healthcare for-profit formed by Cerberus) signed a “stewardship agreement” with the Roman Catholic Archbishop of Boston. According to its terms, “the Catholic identity of the Caritas system is to be found in its adherence to the Directives and the Catholic theological tradition” and in that “all Hospitals will be operated in accordance with the moral, ethical and social teachings of the Roman

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<sup>74</sup> Melanie Evans, *Ascension Looks to Chicago: Alexian Deal Would Be Area's Latest Consolidation*, MOD. HEALTHCARE (May 2, 2011), <http://www.modernhealthcare.com/article/20110502/MAGAZINE/305029960> [<https://perma.cc/36U7-KX46>] (“Vanguard Health Systems, a for-profit chain based in Nashville[,] . . . counts the Blackstone Group, a private-equity firm, as a majority owner . . .”).

<sup>75</sup> Press Release, Office of Att’y Gen. Martha Coakley, Statement of the Massachusetts Attorney General as to the Caritas Christi Transaction 16 (Oct. 6, 2010), <http://www.mass.gov/ago/docs/nonprofit/caritas/statement-of-the-attorney-general-caritas-christi-transaction.pdf> [<https://perma.cc/WXP6-2NPK>] [hereinafter Caritas Christi Massachusetts Attorney General Statement].

<sup>76</sup> Gregory Corcoran, *In Hospital Deal, How Much Is a Catholic Identity Worth? Just 3%*, WALL ST. J. (June 24, 2010, 5:11 PM), <http://blogs.wsj.com/deals/2010/06/24/in-hospital-deal-how-much-is-a-catholic-identity-worth-just-3> [<https://perma.cc/BX3P-E4E3>].

<sup>77</sup> Sister Immacula Wendt, *Holy Cross Keeping Catholic Identity, and Other Letters: Keeping Their Religion*, MOD. HEALTHCARE (Feb. 28, 2011), <http://www.modernhealthcare.com/article/20110228/MAGAZINE/110229960> [<https://perma.cc/YG95-5NAK>] (reporting that Holy Cross of Chicago and St. Vincent Hospital of Worcester, Massachusetts will “keep full Roman Catholic identity” after acquisition by for-profit and have agreements to “preserve the charitable mission of the hospital and adhere to the Catholic ethical and religious directives”).

<sup>78</sup> See, e.g., Press Release, Univ. Hosps. & Sisters of Charity Health Sys., Sisters of Charity Health System and University Hospitals Announce Plans to Transfer Sole Ownership of St. John Medical Center in Westlake to UH (Aug. 31, 2015) (on file with author) (reporting the sale of St. John Medical Center in Cleveland to University Hospitals with oversight by the bishop and “a mission and values committee to ensure that all of the vital components of the hospital’s Catholic identity continue”); Press Release, Univ. of Pittsburgh Schs. of the Health Scis., Attorney General Corbett Approves Agreement for Merger of Mercy and UPMC (May 25, 2007), <http://www.upmc.com/media/NewsReleases/2007/Pages/attorney-general-corbett-approves-agreement-for-merger-of-mercy-and-upmc.aspx> [<https://perma.cc/J9SC-9VZQ>] (reporting the University of Pittsburgh Medical Center system’s purchase of 535-bed Mercy Hospital, which “will continue to operate as a Catholic hospital, under the canonical oversight of the Diocese of Pittsburgh”).

Catholic Church as expressed in the Directives and as interpreted solely and exclusively by” the archbishop.<sup>79</sup>

Under the agreement, an enforcement mechanism in the form of a \$25 million “termination contribution” clause applies if the archbishop determines that the for-profit owners have not lived up to their religion-based obligations.<sup>80</sup> In reviewing and approving the transfer of the hospitals, the Attorney General concluded that the amount was “sufficiently high to deter Steward from exercising its termination rights as a matter of convenience rather than legitimate need.”<sup>81</sup> The agreement acknowledges the possibility that a hospital may be “obligated pursuant to a Legal Requirement to take action” contrary to the ERDs.<sup>82</sup> In such case, however, it purports to grant the archbishop standing to challenge the legal requirement because of his interest in maintaining the Catholic identity of the hospitals.<sup>83</sup>

While this agreement does not apply to future owners, it creates substantial incentives for Steward to negotiate future compliance with the Directives. In particular, it provides that if the hospitals are sold to or merge with other institutions, Steward must pay \$25 million to the archbishop. It may forego payment, however, by securing commitment to the terms of the religious stewardship agreement from any future purchaser.<sup>84</sup>

Other zombie Catholic hospital sales agreements explicitly bind the facility with regard to future owners. For example, in purchasing Queen of Angels/Hollywood Presbyterian Medical Center in Los Angeles, Tenet agreed to abide by the ERDs from 1998 to 2018 and to ensure any subsequent owners also followed the Directives until 2018.<sup>85</sup> In some instances, property law has played a role. In sales of land, restrictive covenants in deeds have purported to forever prohibit the use of the property for sterilization,

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<sup>79</sup> Stewardship Agreement Between Steward and Roman Catholic Archbishop of Boston Regarding Caritas Christi 3 (Apr. 30, 2010), <http://www.mass.gov/ago/docs/nonprofit/caritas/executed-stewardship-agreement.pdf> [<https://perma.cc/8DJL-E4L2>] [hereinafter Caritas Christi Stewardship Agreement].

<sup>80</sup> *Id.* at 8, 12, 15.

<sup>81</sup> Caritas Christi Massachusetts Attorney General Statement, *supra* note 75, at 27.

<sup>82</sup> Caritas Christi Stewardship Agreement, *supra* note 79, at 10.

<sup>83</sup> *Id.*

<sup>84</sup> The agreement states:

In the event of the sale, merger or other transfer of any Hospital (or any substantial portion of its assets or operations) by Steward, either RCAB [Roman Catholic Archbishop of Boston] or Steward may terminate this Agreement with respect to such Hospital and its respective services in its sole discretion . . . . If neither RCAB or Steward terminates this Agreement with respect to such Hospital, Steward, as a condition of closing such sale, merger or other transfer, shall cause the transferee to accept the obligations under this Agreement with respect to such Hospital in a form of agreement reasonably satisfactory to RCAB and to which RCAB is a named party.

*Id.* at 13–14.

<sup>85</sup> FOGEL, *supra* note 64, at 4–5.

abortion, or assisted suicide.<sup>86</sup> When Tenet purchased the Daniel Freeman hospitals from a Catholic system, the asset purchase agreement specified that the Directives would “run with the land,” applying as long as the property included a healthcare facility.<sup>87</sup>

A for-profit joint venture between Ascension, the largest Catholic healthcare system, and Oak Hill Capital Partners, a private investment firm, also envisions constant Catholic compliance, irrespective of ownership.<sup>88</sup> Although a minority owner with a 20% stake, the Catholic partner holds—by the terms of the agreement—“sole authority in perpetuity over compliance with interpretation and application of the *Ethical and Religious Directives* . . . as well as all other elements of Catholic identity—for example, charity care and community benefit.”<sup>89</sup> The Catholicism of the for-profit venture purports to last eternally. According to Ascension, “no ownership change in the company going forward can change” the Catholic partner’s control.<sup>90</sup>

One might query whether zombie Catholic hospitals actually abide by restrictions or claim Catholic identity once sold from the secular buyer to a new owner. Information about subsequent sales is difficult to come by, in part because sales of for-profits are less closely scrutinized than are deals where a nonprofit hospital converts to for-profit status.<sup>91</sup> But several examples suggest religious compliance can persist. After buying two St. Louis-area hospitals in 2001, Tenet negotiated with the subsequent purchaser to preserve compliance with the ERDs.<sup>92</sup> In Knoxville, Tennessee, Baptist Health System was required to comply with Catholic doctrine and shut down

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<sup>86</sup> Associated Press, *Hospital Links Its Policy on Abortion to Land Deal*, N.Y. TIMES (Jan. 6, 1991), <http://www.nytimes.com/1991/01/06/us/hospital-links-its-policy-on-abortion-to-land-deal.html> [<https://perma.cc/B66E-QZUL>] (reporting a deal in which Illinois Masonic Hospital agreed not to perform nontherapeutic abortions as a condition of purchasing land from the Catholic Church).

<sup>87</sup> FOGEL, *supra* note 64, at 5. While courts are unlikely to uphold a restrictive covenant like this as running with the land, it might be enforceable against the buyer and/or for a reasonable period of time against future buyers.

<sup>88</sup> Leo P. Brideau et al., *Examples of For-Profit Health Care Models*, in IS A FOR-PROFIT STRUCTURE A VIABLE ALTERNATIVE FOR CATHOLIC HEALTH CARE MINISTRY? 27, 31 (Kathleen M. Boozang ed., 2012), <https://law.shu.edu/Health-Law/upload/Catholic-Health-Care-Symposium-Proceedings.pdf> [<https://perma.cc/ZU8S-YUCK>].

<sup>89</sup> *Id.* at 29–31.

<sup>90</sup> *Id.* at 31.

<sup>91</sup> See U.S. GEN. ACCOUNTING OFFICE, GAO/HEHS-98-24, NOT-FOR-PROFIT HOSPITALS: CONVERSION ISSUES PROMPT INCREASED STATE OVERSIGHT 22 (1997), <http://www.gao.gov/assets/230/225067.pdf> [<https://perma.cc/QXC4-TSBT>] (stating that, in most states, the attorney general has authority to review nonprofit conversions and, where appropriate, to enforce state requirements that protect charitable benefits).

<sup>92</sup> Judith VandeWater, *Tenet Sells 2 St. Louis-Area Community Hospitals*, ST. LOUIS POST-DISPATCH, Nov. 30, 2004.

tubal ligations and fertility treatments after its merger with Catholic St. Mary's Health System.<sup>93</sup> The subsequent for-profit, secular buyer—Health Management Associates—agreed to continue religious indicia and to prohibit abortion and euthanasia across the formerly Baptist and Catholic hospitals, now operated under the name Tennova.<sup>94</sup> And more than a year and a half after Health Management Associates' sale to Community Health Systems, the nation's largest for-profit system, Tennova's website continued to describe it as a “faith-based healthcare system.”<sup>95</sup> Religious compliance continued as hospitals changed ownership.

Zombie religious hospitals, lacking traditional markers of religious identity or values, may be created not only through affiliation but also through disaffiliation. For example, following a dispute over an abortion at St. Joseph's hospital in Phoenix, the bishop of the Phoenix diocese revoked the hospital's Catholic status.<sup>96</sup> The Sisters of Mercy, the women religious who founded and sponsored the hospital, however, announced that “they will continue their ministry in the hospital.”<sup>97</sup> The hospital did not change its ownership, name, mission, or “operations, policies, and procedures” and committed to “continue through our words and deeds to carry out the healing ministry of Jesus.”<sup>98</sup> St. Joseph's parent company, Catholic Healthcare West,

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<sup>93</sup> Carly Harrington, *Baptist Health System Ceases Tubal Ligations*, KNOXVILLE NEWS SENTINEL (Jan. 25, 2008), <http://archive.knoxnews.com/business/baptist-health-system-ceases-tubal-ligations-ep-412178388-360019551.html> [<https://perma.cc/68X7-EQQB>].

<sup>94</sup> Stephanie Bouchard, *HMA Aims to Acquire Seven Hospitals*, HEALTHCARE FIN. NEWS (May 3, 2011), <http://www.healthcarefinancenews.com/news/hma-aims-acquire-seven-hospitals> [<https://perma.cc/AQT4-LUAK>] (“Many of the hospitals' current traditions and values will remain unchanged, including its ban on direct abortion and euthanasia services.”).

<sup>95</sup> *East Tennessee's Tennova Hospitals May Change Hands Again*, KNOXVILLE NEWS SENTINEL (Aug. 05, 2013), <http://archive.knoxnews.com/business/east-tennessees-tennova-hospitals-may-change-hands-again-ep-510602780-355599891.html> [<https://perma.cc/TRV6-DN62>]; *see also* Shelley DuBois, *Community Health Systems Completes Purchase of HMA*, TENNESSEAN (Jan. 26, 2014, 11:00 PM), <http://www.tennessean.com/story/news/2014/01/27/community-health-systems-completes-purchase-of-hma/4935729> [<https://perma.cc/P7UN-GF5B>]; *About Tennova Healthcare*, TENNOVA HEALTHCARE (2015), <https://web.archive.org/web/20150710012339/http://www.tennova.com> [<https://perma.cc/4CWZ-SAW7>].

<sup>96</sup> Dan Harris, *Bishop Strips Hospital of Catholic Status After Abortion*, ABC NEWS (Dec. 22, 2010), <http://abcnews.go.com/Health/abortion-debate-hospital-stripped-catholic-status/story?id=12455295>. *See generally* Gerald D. Coleman S. S., *Direct and Indirect Abortion in the Roman Catholic Tradition: A Review of the Phoenix Case*, 25 HEC F. 127 (2013) (discussing the conflict).

<sup>97</sup> Press Release, St. Joseph's Hosp. & Med. Ctr., Bishop Olmsted Announcement: Frequently Asked Questions 2 (Jan. 1, 2011), [http://www.dignityhealth.org/cm/Media/documents/Bishop-Olmsted-Announcement-Frequently-Asked-Questions-1-7-11stellent/groups/public/@xinternet\\_con\\_sys/documents/webcontent/212448.pdf](http://www.dignityhealth.org/cm/Media/documents/Bishop-Olmsted-Announcement-Frequently-Asked-Questions-1-7-11stellent/groups/public/@xinternet_con_sys/documents/webcontent/212448.pdf) [<https://perma.cc/DG7Y-B4E5>].

<sup>98</sup> Press Release, St. Joseph's Hosp. & Med. Ctr., St. Joseph's Resolved in Saving Mother's Life, Confident Following Bishop's Announcement 1 (Dec. 21, 2010), [http://www.dignityhealth.org/cm/Media/documents/St-Josephs-Resolved-in-Saving-Mothers-Life-12-21-10stellent/groups/public/@xinternet\\_con\\_sys/documents.pdf](http://www.dignityhealth.org/cm/Media/documents/St-Josephs-Resolved-in-Saving-Mothers-Life-12-21-10stellent/groups/public/@xinternet_con_sys/documents.pdf) [<https://perma.cc/WC2W-TE92>].

subsequently restructured its governance to become Dignity Health, a nonprofit “rooted in the Catholic tradition, but . . . not an official ministry of the Catholic Church.”<sup>99</sup>

In sum, institutions operating under Catholic doctrine fall along a spectrum. The first-order institutions—those officially designated Catholic hospitals—have a sponsoring religious order, are nonprofit, and are recognizable as religious (due to their names or symbols). They lack, however, the many attributes that they once had, such as a community of Catholic administrators, owners, and workers, funding through charitable donations, service to the poor, and close ties to religious orders. Further along the spectrum, the second-order affiliates involve no Catholic ownership interest and are outwardly non-Catholic yet assume Catholic restrictions through contract. At the far end of the spectrum are the third-order zombie religious institutions—hospitals that have no ongoing relationship to a church or union of religious people but nevertheless express Catholic identity. Almost uniformly, they do so to meet their contractual obligations. But increasingly they may seek the opportunity to self-designate as religious even in the absence of contract.

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The contracting of religion creates two distinct problems, which the next two Parts explore. First, contracting religious identity may entitle or require second- and third-order institutions to claim exemptions from otherwise applicable laws. The interplay between vague exemption language and clear contractual obligation may impede public policy goals as the pool of exempted institutions grows. Second, the ever-expanding category of “religious institution” destabilizes theories of religious institutionalism that rest on the specialness of religious institutions and argue for their near-total autonomy from state regulation.

## II. UNDERMINING PUBLIC POLICY

Religious contract provisions not only operate as private agreements but also affect public law. Unlike other contract terms, they potentially allow institutions to claim religious exemption from otherwise applicable laws. Section II.A explores the interplay between contract provisions on the one hand and statutory and judicial exemptions on the other. It shows that

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<sup>99</sup> Press Release, Catholic Healthcare W., Catholic Healthcare West Is Now Dignity Health 1 (Jan. 23, 2012), <http://www.dignityhealth.org/-/media/cm/media/documents/Press%20Releases/2012-01-23-Catholic-Healthcare-West-is-Now-Dignity-Health.ashx> [<https://perma.cc/7APG-EWQH>].

partners, affiliates, and formerly religious hospitals may acquire legal status as religious for the purpose of exemption from employment antidiscrimination laws, medical conscience legislation, and employee benefit protections, among others. They similarly may be able to demand judicial accommodation under the federal Religious Freedom Restoration Act (RFRA)<sup>100</sup> and perhaps the Constitution. Section II.B explains how regulatory arbitrage becomes increasingly plausible as religious exemptions gain financial value and competitors become exempt. Section II.C contends that as the number of exempt institutions grows, exemption may become the rule, and the assumptions under which institutional exemptions were granted may no longer hold.

### *A. Interplay Between Contract and Exemption*

While religious accommodation of individuals is grounded in individual conscience or faith, exemptions of institutions tend to be justified as preserving shared faith or church mission.<sup>101</sup> But, in commerce, contracts instead potentially create eligibility for religious exemption. They also may authorize a diverse array of entities to seek religious exemption under state and federal religious freedom restoration acts (RFRAs) and the Constitution.<sup>102</sup> This relationship between contract and exemption matters because contracts for religious adherence often promote not corporate social responsibility—which presumes surpassing regulatory minimums—but below normal levels of regulatory compliance.

#### *1. Exemptions for Religious Institutions*

Religious institutions most commonly enjoy exemptions in their roles as employers. For example, Title VII of the Civil Rights Act and state antidiscrimination laws authorize religious organizations to discriminate in favor of employees who share their religion.<sup>103</sup> Religious entities may also

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<sup>100</sup> 42 U.S.C. §§ 2000bb–2000bb-4 (2012).

<sup>101</sup> See, e.g., Steven H. Miles et al., *Conflicts Between Patients' Wishes to Forgo Treatment and the Policies of Health Care Facilities*, 321 NEW ENG. J. MED. 48, 50 (1989) (arguing that as society recognizes patients' rights to forego life-sustaining treatment, it must also preserve the "distinct moral communities" embodied by healthcare facilities and reflected in their mission statements).

<sup>102</sup> 42 U.S.C. § 2000bb-1(b). As of May 2017, twenty-one states had enacted state RFRAs with similar language to the federal RFRA. See Jonathan Griffin, *State Religious Freedom Restoration Acts*, NAT'L CONFERENCE OF STATE LEGISLATURES (May 4, 2017), <http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx> [https://perma.cc/AF96-VLMM].

<sup>103</sup> 42 U.S.C. § 2000e-1(a) (stating that Title VII of the Civil Rights Act of 1964 does not apply "to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities"); IDAHO CODE § 67-5910(2)(c) (2016) (providing that it is not a discriminatory practice for a religious educational institution or an educational organization to limit employment or give preference to members of the same religion); see also Kennedy

avoid employee benefits regulation. The Employee Retirement Investment Security Act (ERISA), for example, exempts “church plans” providing pension, retirement, and welfare benefits from minimum funding, notice, and other statutory requirements meant to protect employees’ interests.<sup>104</sup>

Occasionally, religious entities receive special treatment with regard to duties toward the public or consumers. The Americans with Disabilities Act (ADA), for example, prohibits public accommodations from discriminating against people with disabilities but contains a religious exemption.<sup>105</sup> State conscience legislation also may permit healthcare institutions to refuse to perform certain procedures, most frequently abortion, end-of-life care, and sterilization.<sup>106</sup> While healthcare providers have no legal obligation to offer any particular service, such laws may exempt them from legal duties to treat a patient in accordance with acceptable standards of medical practice, to inform her of treatments and their risks and benefits, to refer her for services they are not able to provide, and not to abandon her.<sup>107</sup> They may also lift statutory duties to stabilize or treat patients suffering from emergency conditions,<sup>108</sup> to ensure rape survivors access to emergency contraception,<sup>109</sup> to offer counseling to terminally ill patients about palliative care,<sup>110</sup> and to honor advance directives.<sup>111</sup>

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v. St. Joseph’s Ministries, Inc., 657 F.3d 189, 196 (4th Cir. 2011) (dismissing under Title VII exemption claims of religious harassment, retaliation, and wrongful discharge brought by a member of the Church of the Brethren who was a geriatric nursing assistant in Catholic nursing facility); *Saeemodarae v. Mercy Health Servs.*, 456 F. Supp. 2d 1021, 1040 (N.D. Iowa 2006) (barring a practicing Wiccan’s Title VII claims of religious discrimination against Catholic hospital); *Farnam v. Crista Ministries*, 807 P.2d 830, 840 (Wash. 1991) (holding, under state employment discrimination law, that the mission and holding out of an exempt religious umbrella organization extended the exemption to its subdivisions, in that case a nursing home).

<sup>104</sup> 29 U.S.C. § 1003(b)(2) (2012).

<sup>105</sup> 42 U.S.C. § 12187 (2012).

<sup>106</sup> See, e.g., ARK. CODE ANN. § 20-16-304(5) (2016); IDAHO CODE § 18-611(2) (2016); MISS. CODE ANN. § 41-107-7 (2016); MO. REV. STAT. § 197.032 (2016); MONT. CODE ANN. § 50-20-111 (2015).

<sup>107</sup> 61 AM. JUR. 2D PHYSICIANS, SURGEONS, & OTHER HEALERS § 121 (2017); see also Maxine M. Harrington, *The Ever-Expanding Health Care Conscience Clause: The Quest for Immunity in the Struggle Between Professional Duties and Moral Beliefs*, 34 FLA. ST. U. L. REV. 779, 804, 822–23 (2007).

<sup>108</sup> See, e.g., 210 ILL. COMP. STAT. ANN. 70/1 (2016). State laws, however, cannot exempt hospitals from the federal Emergency Medical Treatment and Labor Act. 42 U.S.C. § 1395dd (2012).

<sup>109</sup> CAL. PENAL CODE § 13823.11(e) (Deering 2016); 410 ILL. COMP. STAT. 70/2.2 (2016); N.M. STAT. ANN. § 24-10D-3 (2016); N.Y. PUB. HEALTH LAW § 2805-p (McKinney 2016); OHIO REV. CODE ANN. § 2907.29 (West 2016); S.C. CODE ANN. § 16-3-1350(B) (2016); WASH. REV. CODE § 70.41.350(1)(c) (2016); see also *State Policies on Contraception*, GUTTMACHER INST., <https://www.guttmacher.org/united-states/contraception/state-policies-contraception> [<https://perma.cc/C6JV-DCFF>].

<sup>110</sup> See, e.g., N.Y. PUB. HEALTH LAW § 2997-c (McKinney 2016).

<sup>111</sup> See, e.g., KY. REV. STAT. ANN. § 311.633(3) (LexisNexis 2016).

Religious institutions also may request judicial accommodation from legal mandates under the Constitution and through operation of statute. The First Amendment of the Constitution allows religious institutions to demand a ministerial exception from laws regulating their relationships with employees deemed “ministers.”<sup>112</sup> More broadly, federal and state RFRA protect against governmental imposition of a substantial burden on religion unless it “(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”<sup>113</sup>

## 2. *Determining Entitlement to Religious Exemptions*

While some statutes circumscribe the institutions entitled to exemption, most contain no definition of religious institution or organization.<sup>114</sup> The ADA exempts “religious organizations or entities controlled by religious organizations.”<sup>115</sup> The statute, however, does not define the terms, and the ADA’s implementing regulations take the perspective that the exemption “is very broad, encompassing a wide variety of situations.”<sup>116</sup> Title VII, for example, says “religious corporation, association, educational institution, or society,” without more.<sup>117</sup> Courts agree on the fact that this language extends beyond houses of worship but on little else.<sup>118</sup>

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<sup>112</sup> *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188–89 (2012). Some courts apply the ministerial exception more broadly to encompass claims based on contract. *See, e.g., DeBruin v. St. Patrick Congregation*, 816 N.W.2d 878, 889 (Wis. 2012).

<sup>113</sup> 42 U.S.C. § 2000bb-1(b) (2012). The federal Religious Land Use and Institutionalized Persons Act (RLUIPA) further permits “a religious assembly or institution” an exemption from a land use regulation that imposes a substantial burden on its religious exercise unless the regulation is in the “furtherance of a compelling governmental interest” and is the “least restrictive means of furthering” that interest. 42 U.S.C. § 2000cc(a)(1).

<sup>114</sup> For scholarly examination of statutory definitions of religious institutions, see generally Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 COLUM. L. REV. 1514 (1979), proposing evaluating a religious organization’s activities along a spectrum from a spiritual core to the secular, and Michael A. Helfand, *What Is a “Church”?: Implied Consent and the Contraception Mandate*, 21 J. CONTEMP. LEGAL ISSUES 401 (2013), arguing that religious institutions should be exempted from legal mandates under the theory of implied consent.

<sup>115</sup> 42 U.S.C. § 12187 (2012).

<sup>116</sup> 28 C.F.R. pt. 36, app. C, § 36.104 (2017); *see also* *Rose v. Cahee*, 727 F. Supp. 2d 728, 748 (E.D. Wis. 2010) (interpreting the ADA’s religious organization exemption to protect an officially designated Catholic healthcare system).

<sup>117</sup> 42 U.S.C. § 2000e-1(a) (2012).

<sup>118</sup> For a sense of the variety of tests in use, see *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass’n*, 503 F.3d 217, 226 (3d Cir. 2007), balancing nine different factors; *Hall v. Baptist Mem’l Health Care Corp.*, 215 F.3d 618, 624–25 (6th Cir. 2000), also balancing nine different factors; *Killinger v. Samford Univ.*, 113 F.3d 196, 198 (11th Cir. 1997), “sufficiently ‘sectarian’”; *EEOC v. Kamehameha Sch./Bishop Estate*, 990 F.2d 458, 460 (9th Cir. 1993), “primarily religious”; and *Fike v. United Methodist Children’s Home of Va., Inc.*, 547 F. Supp. 286, 289–90 (E.D. Va. 1982), *aff’d*, 709 F.2d 284 (4th Cir. 1983).

The ambiguous and broad language of institutional exemptions often leads courts to use a number of contradictory factors to identify a religious institution. Across contexts, an official link to an established church proves relevant.<sup>119</sup> Courts may look to control by a religious institution through board representation or involvement in management.<sup>120</sup> Less often, courts take an associational view of the institution, requiring a religious entity to serve and employ coreligionists. Alternatively, mission-oriented characteristics can indicate religious status. Courts examine the corporate structure, bylaws, articles of incorporation, or other corporate documents for religious references.<sup>121</sup> They may look to whether an entity held itself out as religious such that “the religious character of the institution was open and obvious” to employees or the public.<sup>122</sup> Finally, the profit- or revenue-seeking nature of an enterprise can indicate secular pursuits. Statutes may expressly limit the scope of institutional accommodation to nonprofit entities.<sup>123</sup> And, sometimes, where statutes are silent, courts have identified nonprofit status as a marker (or, indeed, the marker) of religiosity.<sup>124</sup> While statutes vary, courts typically apply some mix of these factors, emphasizing and deemphasizing particular ones.

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<sup>119</sup> Some statutory language so requires. *See, e.g.*, 29 U.S.C. § 1002(33)(C)(iv) (2012) (defining an organization eligible to participate in church plans exempted from ERISA as one “associated with a church or a convention or association of churches” where the organization “shares common religious bonds and convictions with that church or convention or association of churches”).

<sup>120</sup> *LeBoon*, 503 F.3d at 226 (suggesting as a factor for determining religious exemption under Title VII “whether a formally religious entity participates in the management, for instance by having representatives on the board of trustees”).

<sup>121</sup> *See, e.g.*, *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299, 310 (4th Cir. 2004) (holding that a nursing home is a “religious institution” for purposes of ministerial exception so as to exempt from Fair Labor Standards Act whenever its “mission is marked by clear or obvious religious characteristics”); *see also* *Spencer v. World Vision, Inc.*, 633 F.3d 723, 734 (9th Cir. 2011) (O’Scannlain, J., concurring) (setting out a test consisting of (1) nonprofit status, (2) a self-identified religious purpose, (3) activity consistent with and in furtherance of those purposes, and (4) holding oneself out as religious); *Saeemodarae v. Mercy Health Servs.*, 456 F. Supp. 2d 1021 (N.D. Iowa 2006) (barring a Wiccan employee’s religious discrimination claim against Catholic hospital).

<sup>122</sup> Michael A. Helfand, *Religion’s Footnote Four: Church Autonomy as Arbitration*, 97 MINN. L. REV. 1891, 1936 (2013). Helfand notes that “the court in *Shaliehsabou* also emphasized various ways in which the defendant conducted business such that it would be obvious to an employee that the institution was religious.” *Id.*

<sup>123</sup> *See, e.g.*, MINN. STAT. § 363A.26 (2013) (exempting “religious association, religious corporation, or religious society that is not organized for private profit” from “taking any action with respect to the provision of goods, services, facilities, or accommodations directly related to the solemnization or celebration of a civil marriage that is in violation of its religious beliefs”).

<sup>124</sup> *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 344 (1987) (Brennan, J., concurring in the judgment) (“The fact that an operation is not organized as a profit-making commercial enterprise makes colorable a claim that it is not purely secular in orientation.”); *see also* *World Vision*, 633 F.3d at 734 (O’Scannlain, J., concurring) (“[A]n organization’s status as a nonprofit bolsters a claim that its purpose is nonpecuniary.”).

With regard to RFRA and the First Amendment ministerial exception, judicial tests—though ill-defined—also seem to employ multiple factors to discern religious belief in institutional form. For example, in interpreting “person” capable of exercising religion under RFRA to include for-profit corporations, the Supreme Court, in its *Hobby Lobby* decision, dismissed the idea that religious affiliation or incorporation as religious is a prerequisite for religiosity.<sup>125</sup> Instead, it highlighted the associational interests preserved through institutional religious identity. As the Court saw it, a for-profit corporation unites individuals in their devotion to religious tenets, just as a religious organization might.<sup>126</sup> The Court, however, also seemed to accept a view of religious identity focused on the entity and thus noted that corporate documents could manifest religion.<sup>127</sup>

In elaborating on the constitutional ministerial exception in *Hosanna-Tabor*, the Court was similarly imprecise. It used the terms “church,” “religious organization,” “religious group,” and “religious institution” interchangeably in a case involving a school.<sup>128</sup> Indeed, courts have interpreted the ministerial exception to allow healthcare entities to engage in discrimination against and undercompensate employees.<sup>129</sup> For example, one court dismissed a racial and religious discrimination claim brought by a hospital chaplain against New York Methodist Hospital, part of the New York-Presbyterian Healthcare system.<sup>130</sup> The hospital had not been owned by the Methodist Church for decades, had revised its certificate of incorporation to remove any relation to the church, affirmatively had stated that it was a secular organization, and had employed members of various faiths within its pastoral program. Nonetheless, the court held that the hospital was entitled to the ministerial exception through its historic relationship to the church, active pastoral care (admittedly provided by leaders of various faiths, as it is

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<sup>125</sup> 134 S. Ct. 2751, 2769 (2014).

<sup>126</sup> *Id.* at 2768–69 (noting that the protection of corporate religion safeguards the rights of “the people (including shareholders, officers, and employees) who are associated with a corporation in one way or another”).

<sup>127</sup> *Id.* at 2764–66 (noting that Conestoga Wood’s “Vision and Values Statements” required the company to “ensur[e] a reasonable profit in [a] manner that reflects [the shareholders’] Christian heritage” and Hobby Lobby’s statement of purpose committed to “operating the company in a manner consistent with Biblical principles” (first and second alteration in original)).

<sup>128</sup> *See, e.g., Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 173, 181, 188 (2012).

<sup>129</sup> *See, e.g., Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223 (6th Cir. 2007) (precluding ADA claims of resident in clinical pastoral education program in hospital); *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299, 309–11 (4th Cir. 2004) (preventing kosher supervisor from proceeding with Fair Labor Standards Act wage claim against Jewish nursing home); *Scharon v. St. Luke’s Episcopal Presbyterian Hosps.*, 929 F.2d 360 (8th Cir. 1991) (barring hospital chaplain’s sex and age discrimination claims).

<sup>130</sup> *Penn v. N.Y. Methodist Hosp.*, 158 F. Supp. 3d 177 (S.D.N.Y. 2016).

in secular hospitals), maintenance of “Methodist” in its name, and significant required Methodist representation on its board.<sup>131</sup> The hospital was “acting as a religious institution” with regard to the plaintiff—even though it was “primarily a secular institution.”<sup>132</sup>

The various affiliates of churches and the rise of parachurch organizations unconnected to an official church have occasionally challenged courts and regulators,<sup>133</sup> but the increasing combination of religion and commerce (or even the pursuit of profit) poses more difficult questions about which institutions count as religious. In particular, what does it mean for an institution to be *religious* in a market where commercial agreements call for religious adherence? A number of courts (and scholars) include officially designated Catholic hospitals within the realm of religious institutions for purposes of statutory and constitutional exemptions.<sup>134</sup> But are these “original” first-order religious institutions entitled to accommodation also authorized to extend exemption to their commercial counterparts through contract?

Contracted-for religious identity and compliance add complexity that statutory language and constitutional doctrine are currently ill prepared to confront. As this Article demonstrated in Part I, facilities may claim “Catholic” identity even when they further no charitable mission, when they are repudiated by the Church, or when Catholic entities hold no ownership stake. The inclusion of public entities and for-profit investment funds in the universe of enterprises following religious restrictions further confounds. While one can easily tell where a natural person begins and ends, the demarcation of the boundaries of an institution presents a thornier problem.

Even in a single statutory framework, factors used to identify a religious institution point in different directions with regard to contracted-for religion. Recall the Caritas system in Boston that was sold to for-profit Cerberus.<sup>135</sup>

<sup>131</sup> *Id.* at 182.

<sup>132</sup> *Id.* at 183.

<sup>133</sup> Thomas M. Messner, *Can Parachurch Organizations Hire and Fire on the Basis of Religion Without Violating Title VII?*, 17 U. FLA. J.L. & PUB. POL’Y 63, 69–71 (2006) (explaining that the broader question of which parachurch organizations are “religious” remains latent).

<sup>134</sup> *Overall v. Ascension*, 23 F. Supp. 3d 816, 831 (E.D. Mich. 2014) (“Courts view the Official Catholic Directory listing as a public declaration by the Roman Catholic Church that an organization is associated with the Church.”); *see also* *Catholic Charities of Me., Inc. v. City of Portland*, 304 F. Supp. 2d 77, 85–86 (D. Me. 2004) (referring to, *inter alia*, the Official Catholic Directory as evidence that Catholic Charities’ health benefit plans qualify for ERISA church plan status); *Hartwig v. Albertus Magnus Coll.*, 93 F. Supp. 2d 200, 202–03 (D. Conn. 2000) (“[T]he Official Catholic Directory . . . is the definitive compilation of Roman Catholic institutions in the United States.”). For examples in the scholarly literature, *see supra* note 13.

<sup>135</sup> *See supra* notes 74–83 and accompanying text (describing the sale of Caritas Assets to Cerberus—a private equity fund—and the provisions of the Asset Sale and Purchase Agreement).

The facilities now are for-profit and investor owned, and the Church has no direct or indirect financial interest in the facilities. If, however, courts deferred to the Catholic hierarchy, the chain would be considered Catholic and thus a religious institution. Examination of corporate documents might lead to a similar result, as Cerberus agreed to continue the chain's Catholic identity, Catholic officials exercise oversight of the facilities, and the ERDs constitute corporate policy.<sup>136</sup> Alternatively, courts might find disqualifying the absence of Church hierarchy from the board of directors and its ultimate lack of control over corporate assets.<sup>137</sup> Courts considering the outward signs of the religious character of the institution might be swayed by Cerberus's contractual agreement to maintain pastoral care, chaplaincy, and religious symbols.<sup>138</sup> If, as some argue, "an organization that affiliates with a religious group, declares a religious mission, and has some religious qualities will qualify for the exemption" under Title VII,<sup>139</sup> many formerly religious and nominally secular hospitals will be allowed to engage in religious discrimination.

Courts might reach contradictory results depending on their form of inquiry. If ownership is determinative, Baptist ownership of 50% of Cullman Regional Medical Center (in a public-private partnership) might make that facility more religious than the for-profit hospital formed in an 80-20 joint venture between for-profit secular Oak Hill Capital and Catholic Ascension Health.<sup>140</sup> If the obviousness of religious identity matters, now-secular West Suburban hospital might be disqualified from claiming it is a religious institution because of its lack of religious symbols or message despite having assumed obligations to abide by Catholic directives.<sup>141</sup> By contrast, otherwise-identical Tennova health system—a once-Baptist/Catholic system—could continue to claim its stated identity as a "faith-based organization" and likely any exemptions for which it was previously eligible.<sup>142</sup>

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<sup>136</sup> See generally *Caritas Christi Stewardship Agreement*, *supra* note 79 (contracting for the continuation of Catholic healthcare standards after the sale to a for-profit entity).

<sup>137</sup> *Scharon v. St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360, 362 (8th Cir. 1991) (finding that a religious hospital qualified as a religious institution for the purposes of the ministerial exception in part because of the composition of the board of directors and that the articles of association could only be amended by approval of church hierarchy).

<sup>138</sup> *Caritas Christi Stewardship Agreement*, *supra* note 79, at 4-5.

<sup>139</sup> Roger W. Dyer, Jr., Note, *Qualifying for the Title VII Religious Organization Exemption: Federal Circuits Split over Proper Test*, 76 MO. L. REV. 545, 556-57 (2011).

<sup>140</sup> See Romano, *supra* note 54; *supra* note 88.

<sup>141</sup> See Stempniak, *supra* note 1 (noting that religious artifacts will be removed but the hospitals will follow Catholic healthcare directives).

<sup>142</sup> See *supra* note 95.

Mixed-religion institutions further complicate analysis. For example, Baptist hospitals have affiliated with Catholic facilities, agreeing to comply with Catholic doctrine but receiving assurances that the Baptist faith and identity will continue.<sup>143</sup> In the case of a nontherapeutic abortion where the Catholic and Baptist teachings align, the Baptist hospital could assert its Baptist faith. It seems plausible, however, that if it later denies a tubal ligation to comply with the Catholic directives, it would raise Catholic faith as qualifying it for exemption in states that allow for religious refusals.

### B. Potential for Regulatory Arbitrage

In healthcare, contract and exemption tend to operate together, with institutions acquiring religious identity through connection to “original” first-order religious institutions. Hospital owners generally have not strategically denominated facilities as religious. Nonetheless, some healthcare systems now unite Catholic, non-Catholic, and secular facilities, and take religious exemptions when expedient. And Dignity Health, discussed in Part I, disaffiliated with the Church but continues to claim Catholic identity.<sup>144</sup>

Where corporate identity is easy to acquire and religious exemptions are financially valuable, regulatory arbitrage may become a more common practice. Commercial actors whose competitors enjoy religious exemption through contract may come to self-designate as religious. In that case, the concern shifts from the scope of contractual obligation squarely to the breadth of exemption.

Some judicial tests for the identification of religious institutions leave the door open for corporations to self-designate as religious and therefore entitled to exemption. For example, in *Spencer v. World Vision*, Judge Diarmuid O’Scannlain indicated that, provided a corporation was nonprofit, its identification of a religious identity and purpose sufficed to bring it within the scope of Title VII’s institutional exemption.<sup>145</sup> Thus, the entity’s ability to claim religious exemption lay primarily within its control. Concurring in the result, Judge Andrew Kleinfeld disagreed on this point, signaling alarm about potential gaming of the religious exemption. Focusing on corporate documents allowed, he said, “nonprofit institutions with church affiliations to use their affiliations as a cover for religious discrimination in secular

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<sup>143</sup> See Wood, *supra* note 51 (describing affiliation of Baptist and Catholic hospitals that committed to preserving the religious values of both faiths).

<sup>144</sup> See Press Release, Catholic Healthcare W., *supra* note 99 (stating that the new name of the hospital reflects the reality that the hospital, though rooted in Catholic principles, is not officially connected to the Catholic Church).

<sup>145</sup> 619 F.3d 1109, 1119–20 (9th Cir. 2010) (setting out this proposed test).

employment” and “people to advance discriminatory objectives outside the context of religious exercise by means of mere corporate paperwork.”<sup>146</sup>

Following the Supreme Court’s *Hobby Lobby* decision, for-profit corporations may be able to self-designate as religious for purposes of RFRA as well. The decision seemingly allows a corporation to establish religious identity through corporate documents,<sup>147</sup> even those prepared in anticipation of litigation.<sup>148</sup> Any such company then can become eligible to claim exemption from federal law under RFRA.

Where economic interest aligns with religious exemption, commercial operations may claim religious status opportunistically. As Judge Mary Beck Briscoe noted in her dissent from the Tenth Circuit’s *Hobby Lobby* opinion,

[I]f all it takes for a corporation to be categorized as a “faith based business” for purposes of RFRA is a combination of a general religious statement in the corporation’s statement of purpose and more specific religious beliefs on the part of the corporation’s founders or owners, the majority’s holding will have, intentionally or unwittingly, opened the floodgates to RFRA litigation challenging any number of federal statutes that govern corporate affairs.<sup>149</sup>

Whereas the grant of an exemption for the religious use of peyote, for example, is “self-limiting” by virtue of the drug’s unpleasantness,<sup>150</sup> exemption from employer regulation has no such limits. Given the breadth of Title VII’s language regarding religious organizations, another court worried that it too could come to “immunize[] virtually every endeavor undertaken by a religious organization,” even including “a trucking firm, a chain of motels, a race track, a telephone company, a railroad, a fried chicken franchise, or a professional football team.”<sup>151</sup> A wide pool of claimants might

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<sup>146</sup> *Id.* at 1130 (Kleinfeld, J., concurring); *id.* at 1127; *see also id.* at 1147 (Berzon, J., dissenting) (expressing concern that rejecting the inquiry into the link between commercial activity and self-identified religious purpose means “disregard[ing] the fact that the manufacture of equipment remains the organization’s primary operational pursuit and that there is nothing more than the asserted religious beliefs of the organization’s founders to connect that secular activity to the stated religious purpose”).

<sup>147</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2764–66 (2014) (looking to corporate documents of for-profit Hobby Lobby and Conestoga Wood).

<sup>148</sup> *See, e.g., Conestoga Wood Specialties Corp. v. Sebelius*, 917 F. Supp. 2d 394, 403 (E.D. Pa. 2013) (noting that more than a year after the contraceptive regulation was issued but before its plan became subject to the mandate, “the board of directors adopted “The Hahn Family Statement on the Sanctity of Human Life”).

<sup>149</sup> *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1174 (10th Cir. 2013) (Briscoe, J., concurring in part and dissenting in part), *aff’d sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

<sup>150</sup> *Emp’t Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872, 914 n.7 (1990) (Blackmun, J., dissenting) (“The peyote plant is extremely bitter, and eating it is an unpleasant experience, which would tend to discourage casual or recreational use.”).

<sup>151</sup> *King’s Garden, Inc. v. FCC*, 498 F.2d 51, 54 (D.C. Cir. 1974).

emerge in the event that, as some claim, a significant and increasing trend exists toward bringing religion into corporate governance.<sup>152</sup>

The expanding use of ERISA's church plan exemption makes manifest the potential appeal to commercial actors of religious identity and exemption.<sup>153</sup> Church plan status provides great financial value because it permits employers to underfund pension plans, avoid federal pension insurance payments, and fail to notify employees of the plan's status.<sup>154</sup> The exemption in turn can aid the sale of religiously affiliated hospitals to secular buyers (which then assume no pension obligations) and the purchase of hospitals by religious systems, which can deregulate the pension plans after purchase (even if the hospitals remain secular).<sup>155</sup>

Indeed, healthcare systems and hospitals use church plans selectively. They label pensions "church plans" to avoid ERISA's extensive regulation but categorize health benefits as ERISA plans to benefit from ERISA preemption of state insurance regulations.<sup>156</sup> Other healthcare entities have converted their employees' long-standing ERISA pension plans to church plan status in response to the economic downturn<sup>157</sup> or on the advice of consulting firms.<sup>158</sup> Four of the nation's ten largest multimillion-dollar

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<sup>152</sup> See, e.g., Paul Horwitz, *The Hobby Lobby Moment*, 128 HARV. L. REV. 154, 180–81 (2014) (arguing that people increasingly integrate business and religion); Robert K. Vischer, *How Necessary Is the Right of Assembly?*, 89 WASH. U. L. REV. 1403, 1414–15 (2012) (arguing that "reality of the corporate landscape" shows a commitment to religious and moral positions).

<sup>153</sup> See 29 U.S.C. § 1002(33) (2012) (defining "church plan"). ERISA exempts church plans providing pension, retirement, and welfare benefits from minimum funding, notice, and other statutory requirements that would otherwise protect employees. *Id.*

<sup>154</sup> Norman Stein, AM. BAR. ASS'N SECTION OF LABOR & EMP'T LAW, *An Article of Faith: The Gratuity Theory of Pensions and Faux Church Plans*, EMP. BENEFITS COMM. NEWSLETTER (2014), [http://www.americanbar.org/content/newsletter/groups/labor\\_law/ebc\\_newsletter/14\\_sum\\_ebc\\_news/fai th.html](http://www.americanbar.org/content/newsletter/groups/labor_law/ebc_newsletter/14_sum_ebc_news/fai th.html) [<https://perma.cc/5NLH-THEJ>] (noting the consequences of receiving church plan status from the IRS).

<sup>155</sup> Karin Price Mueller, *Bamboozled: How Catholic Hospitals Get Away with Letting Pensions Go Broke*, NJ.COM (published Nov. 28, 2016, 9:09 AM; updated Nov. 28, 2016, 9:40 AM), [http://www.nj.com/business/index.ssf/2016/11/bamboozled\\_how\\_catholic\\_hospitals\\_get\\_away\\_with\\_le .html](http://www.nj.com/business/index.ssf/2016/11/bamboozled_how_catholic_hospitals_get_away_with_le .html) [<https://perma.cc/3279-CDKX>] (discussing conversions of Catholic hospital employee pension plans to underfunded church plans and subsequent sales of hospitals to nonprofit and for-profit buyers that thus assumed no funding obligations).

<sup>156</sup> See, e.g., Complaint – Class Action at 41–45, *Griffith v. Providence Health & Servs.*, No. 2:14-cv-01720 (W.D. Wash. Nov. 7, 2014), ECF No. 1 (noting that Providence, a large healthcare system with 73,000 employees, claims its pension plan is an exempt church plan but follows ERISA for its welfare benefit plan).

<sup>157</sup> See, e.g., *Kaplan v. St. Peter's Healthcare Sys.*, No. 13-2941 (MAS)(TJB), 2014 WL 1284854, at \*2 (D.N.J. Mar. 31, 2014) (noting that SPHS filed its application for church plan status during the nationwide economic downturn in 2006).

<sup>158</sup> See, e.g., Mary Williams Walsh, *I.R.S. Reversal on 'Church' Pension Plan Rescues a Fund*, N.Y. TIMES (Apr. 1, 2013), <http://www.nytimes.com/2013/04/02/business/an-irs-reversal-rescues-a-pension->

healthcare systems in 2017 operated their pension plans as church plans.<sup>159</sup> In this way, they avoided regulations to which their secular competitors are subject.

### C. *Exception Swallowing the Rule*

In crafting religious accommodations, legislatures and courts take as a fundamental premise that accommodation does not defeat the purpose of the law. As Professor Perry Dane describes them, free exercise exemptions are “more an island in a world of legal obligation than an overarching challenge to the notion of such obligation.”<sup>160</sup> Religious objectors will not become so numerous or so powerful as to thwart the achievement of policy goals or threaten the rights of other citizens. This prediction of relatively small numbers of objectors relies—in part—on the impermanence of objectors. Individuals die, commercial actors fail in the marketplace, and their exemptions go with them. This Section examines litigation surrounding the Affordable Care Act’s contraceptive mandate, ERISA church plan exemption eligibility, and conscience legislation to demonstrate how contract expands religious exemptions and risks the rule.

Recent litigation against the Affordable Care Act’s contraceptive mandate highlights the role of private law in widening religiosity and exemption. *Hobby Lobby* involved a corporation that used private law both to create and to perpetuate religious identity. Family members involved in the ownership and direction of the corporation had to agree to religious

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fund.html [https://perma.cc/6FXG-ZHAR] (“Tough economic times, and pitches from benefits consultants, have prompted more than 100 faith-based employers to seek church plan status . . .”).

<sup>159</sup> Laura Dyrda, *10 Largest US Health Systems: Which Had the Biggest Revenue Increase in 2016?*, BECKER’S HOSP. REV. (Mar. 3, 2017), <https://www.beckershospitalreview.com/hospital-finance/10-largest-us-health-systems-which-had-the-biggest-revenue-increase-in-2016.html>

[https://perma.cc/H5B7-6KXV] (showing increase in patient revenues in ten largest health systems); *see also* Medina v. Catholic Health Initiatives, 147 F. Supp. 3d 1190, 1193 (D. Colo. 2015) (same); Overall v. Ascension, 23 F. Supp. 3d 816, 820 (E.D. Mich. 2014) (same); Rollins v. Dignity Health, 19 F. Supp. 3d 909, 910 (N.D. Cal. 2013) (same); Complaint – Class Action, *supra* note 156, at 1–2 (noting that the healthcare employer’s retirement plan was claimed to be a “church plan” under ERISA); Complaint – Class Action at 1–2, Chavies v. Catholic Health E., No. 2:13-cv-01645-CDJ (E.D. Pa. Mar. 28, 2013), ECF No. 1 (same).

<sup>160</sup> Perry Dane, *Constitutional Law and Religion*, in A COMPANION TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 119 (Dennis Patterson ed., 2d ed. 2010), Blackwell Reference Online.

precepts.<sup>161</sup> A trust ensured that, even after the company's founder and family patriarch steps down, the corporation will continue on as religious.<sup>162</sup>

In other litigation against the mandate, contract again was at issue. Nonprofit religious employers argued that their accommodation from the contraceptive mandate did not suffice because their religious convictions forbid them from contracting with companies that must comply with their own regulatory obligations to provide contraception to the nonprofits' employees.<sup>163</sup> In effect, the employers demanded accommodation for entities with which they have a contractual relationship.

Contracted-for religious compliance may convert the religious principles of a minority into the practice of a plurality, or majority, of people. ERISA's church plan exemption offers an example where affiliations have widened the reach of religious exemption. At the core of the church plan exemption is the institutional church. The statute thus requires an "association" with a church, focusing on whether an entity shares "common religious bonds and convictions with that church."<sup>164</sup> Through affiliation, nonchurch entities—like hospitals and social service providers—have benefited from deregulation of their employees' pension plans.<sup>165</sup>

Religious health systems have brought secular entities under their umbrella and into the exemption regime. For example, Providence—a Catholic healthcare system with thirty-four hospitals and more than 73,000 employees—claimed a church plan exemption for its pension plan. Included in that plan were employees of recently acquired facilities with no religious

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<sup>161</sup> Verified Complaint at 9, *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278 (W.D. Okla. 2012) (No. 5:12-CV-01000-HE), 2012 WL 4009450 (noting that all family members "must sign a Trust Commitment, which among other things requires them to affirm the Green family statement of faith and to 'regularly seek to maintain a close intimate walk with the Lord Jesus Christ by regularly investing time in His Word and prayer'").

<sup>162</sup> David Whitford, *Hobby Lobby's Religious Real Estate Hobby*, FORTUNE (Oct. 22, 2010, 6:10 AM), [http://archive.fortune.com/2010/10/21/news/companies/hobby\\_lobby\\_philanthropy.fortune/index.htm](http://archive.fortune.com/2010/10/21/news/companies/hobby_lobby_philanthropy.fortune/index.htm) [<https://perma.cc/R2QH-5URC>] ("[W]hen Green [the company's founder] dies, ownership of Hobby Lobby will pass to a trust, eliminating any possible means or motive on the part of his descendants to sell, go public, or otherwise interrupt the [religious identity].").

<sup>163</sup> See, e.g., *Univ. of Notre Dame v. Sebelius*, 743 F.3d 547, 557 (7th Cir. 2014) (summarizing Notre Dame's argument that the contraceptive mandate "imposes a substantial burden on it by forcing the university to 'identify[ ] and contract[ ] with a third party willing to provide the very services Notre Dame deems objectionable'" (alterations in original)).

<sup>164</sup> 29 U.S.C. § 1002(33)(C)(iv) (2012) (defining an organization eligible to participate in church plans exempted from ERISA as one "associated with a church or a convention or association of churches" where the organization "shares common religious bonds and convictions with that church or convention or association of churches").

<sup>165</sup> *Overall v. Ascension*, 23 F. Supp. 3d, 816, 832 (E.D. Mich. 2014) (noting plaintiff's arguments that Ascension lacked common bonds with a church and acted like a secular, revenue-seeking entity, in particular through its many joint ventures with for-profits).

identity.<sup>166</sup> Having cut ties with the Catholic Church, another health system, Dignity Health, nonetheless has argued that its employee retirement plan is a “church plan” not subject to regulation under ERISA.<sup>167</sup> For approximately two decades, the IRS routinely issued letter rulings in favor of church plan status for such entities.<sup>168</sup>

The interaction between contract and conscience legislation offers another example of the exception risking the rule. Conscience laws offer broad immunity from regulatory enforcement, professional discipline, and tort liability to clinicians who refuse to provide certain services, such as abortion care, for religious reasons.<sup>169</sup> Contracts requiring refusal of certain procedures potentially shape the scope of this exemption in two ways. First, contracts of religious compliance inevitably affect individual religious exemption. As a rule, conscience legislation requires that individual providers hold religious, moral, or ethical reasons for refusing care. If a provider holds no such beliefs but refuses care in compliance with contract, would he fall within the reach of the exemption? Contractual terms that require him to withhold care or information from patients seem to constitute an agreement to commit a tort (unenforceable as a matter of public policy) but have been used to create compliance in religious institutions for decades.

Second, secular partners of religious entities may acquire immunity through commercial transaction. In some states, any entity may refuse to provide abortions for any reason; the institution need not claim a religious reason for refusal.<sup>170</sup> In those states, contracts requiring refusal of services for religious reasons shift practice in the healthcare marketplace but do not

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<sup>166</sup> Complaint – Class Action, *supra* note 156, at 20, 28.

<sup>167</sup> *Rollins v. Dignity Health*, 19 F. Supp. 3d 909, 912 (N.D. Cal. 2013).

<sup>168</sup> *See Stein, supra* note 154; *see also* I.R.S. Gen. Couns. Mem. 39,007 (July 1, 1983), 1983 WL 197946 (construing ERISA’s requirement that a church plan be established and maintained by a church to allow a plan to qualify as a “church plan” where it is maintained by an entity “associated” with a church).

<sup>169</sup> *See, e.g.,* ARIZ. REV. STAT. ANN. § 36-3205(C) (2017) (“A health care provider is not subject to criminal or civil liability or professional discipline for . . . [f]ailing to comply with a decision or a direction [at the end of life] that violates the provider’s conscience . . . .”); N.J. STAT. ANN. § 2A:65A-3 (West 2016) (“The refusal to perform, assist in the performance of, or provide abortion services or sterilization procedures shall not constitute grounds for civil or criminal liability, disciplinary action or discriminatory treatment.”).

<sup>170</sup> Typical statutory language reads: “A hospital is not required to admit any patient for the purpose of performing an abortion.” ARIZ. REV. STAT. ANN. § 36-2154(A) (2017). Several also allow refusals of other procedures without religious or moral reason. *See, e.g.,* KAN. STAT. ANN. § 65-447 (2012) (“No medical care facility, medical care facility administrator, or governing board of any medical care facility shall be required to permit the performance, referral for or participation in medical procedures resulting in sterilization within its facility . . . .”); WYO. STAT. ANN. § 35-22-410(a)(v) (2007) (immunizing healthcare institutions that decline to follow an advance directive which “is contrary to . . . the written policies of the institution”).

alter the category of exempted entity. But in a number of states and with regard to most procedures other than abortion, statutes expressly apply only to institutions that refuse care for religious or moral reasons.<sup>171</sup> And as Part I showed, institutions—ranging from formerly Catholic for-profits to secular partners of Catholic healthcare—refuse services due instead to their contractual obligations.

Consider Highline Medical Center in Washington State, which remained secular following its acquisition by Catholic Franciscan but discontinued religiously restricted reproductive and end-of-life services.<sup>172</sup> Under Washington law, healthcare facilities may not be required “to participate in the provision of . . . [any] specific service if they object to so doing for reason of conscience or religion.”<sup>173</sup> The law makes clear that it is balancing the accommodation of providers’ objections against a public policy goal of ensuring patients’ timely access to health services.<sup>174</sup> A contractual commitment to religious compliance should not suffice to counterbalance patients’ rights to care and to render the institution eligible for exemption under laws that specify religious or moral objections. Yet the contracting parties seem to take it to do just that.

Whether the exception swallows the rule may depend in part on the form the exemption takes: in other words, whether it is granted by statute, regulation, or the courts. Statutory exemptions may be especially likely to

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<sup>171</sup> ARIZ. REV. STAT. ANN. § 36-2154(B) (2017) (allowing refusal of abortion, emergency contraception, or “any medication or device intended to inhibit or prevent implantation of a fertilized ovum” based “on moral or religious grounds”); 18 PA. CONS. STAT. § 3213(d) (1988) (with regard to abortions, a medical facility is not required to act against “its conscience”); VA. CODE ANN. § 18.2-75 (1975) (specifying that abortion refusal must be based on “personal, ethical, moral or religious grounds”).

In the majority of states, refusal to comply with a directive or instruction at the end of life requires reasons of conscience. *See, e.g.*, ARK. CODE ANN. § 20-6-109(c) (2013) (“A healthcare institution may decline to comply with an individual instruction or healthcare decision if the instruction or decision . . . [i]s contrary to a policy of the institution that is based on reasons of conscience . . .”). For near-identical language, see ALASKA STAT. § 13.52.060(e) (2008); ARIZ. REV. STAT. ANN. § 36-3205(C)(1) (2014); CAL. PROB. CODE § 4734 (b) (West 2000); DEL. CODE ANN. tit. 16, § 2508(e) (1996); HAW. REV. STAT. § 327E-7(e) (1999); IDAHO CODE § 39-4508 (2012); IND. CODE § 30-5-9-10(2) (1991); ME. STAT. tit. 18-A, § 5-807(e) (1995); MD. CODE ANN., HEALTH-GEN. § 5-613 (LexisNexis 1993); MASS. GEN. LAWS ch. 201D, § 14 (1990); MO. REV. STAT. § 404.830(1) (1991); N.M. STAT. ANN. § 24-7A-7(E) (2015); 20 PA. CONS. STAT. § 5424(a) (2006); TENN. CODE ANN. § 68-11-1808 (2004); and VT. STAT. ANN. tit. 18, § 9713(c)(3) (2018).

<sup>172</sup> Ostrom, *supra* note 43 (quoting Highline CEO Mark Benedum as saying his hospital will remain secular but align its ethics policies with Franciscan’s). Another example in Washington is Providence Health’s affiliation with Swedish, which then cut abortions at all five of its hospitals. Carol M. Ostrom, *Swedish Alliance with Providence Is Now Complete*, SEATTLE TIMES (Feb. 1, 2012, 11:32 PM), <http://www.seattletimes.com/seattle-news/swedish-alliance-with-providence-is-now-complete> [<https://perma.cc/BE4E-SZS7>].

<sup>173</sup> WASH. REV. CODE § 48.43.065(2)(a) (2017).

<sup>174</sup> *Id.* § 48.43.065(1), (2)(b). For a similar framework, see COLO. REV. STAT. § 25-6-102 (2017).

grow because institutions can effectively claim them sub silentio. For example, a hospital may benefit from exemption through a conscience law without notifying the state. Some laws even seem to contemplate that contract will create religious identity sufficient for exemption from otherwise applicable law. For example, Utah's recent nondiscrimination law exempts from housing and employment nondiscrimination an affiliate of a religious organization, defined in part by contract.<sup>175</sup> Legislators, however, may not have appreciated the extent to which religious organizations contract for religious compliance.

Regulatory exemptions may also apply broadly. Consider, for example, that the IRS regularly issues church plan exemptions to nonchurch affiliates, including those that encompass secular entities, and until recently did not require employers to notify their employees of a change to church plan status.<sup>176</sup> Another example can be found in the contraceptive coverage regulations issued following *Hobby Lobby*. Under those regulations, "any for-profit entity that is controlled directly or indirectly by a nonprofit eligible organization" could claim a religious accommodation from the contraceptive mandate.<sup>177</sup> This interpretation could mean that for-profit entities created through a joint venture between a for-profit investor and a religious entity could claim accommodation (or be required to do so through contract). Any such for-profit entity could qualify for religious accommodation by virtue of its mere connection to a religious nonprofit entity.

Seeking exemption under RFRA, by contrast, requires an institution to more visibly declare its religious beliefs. Some of the new purportedly religious institutions—such as the investor-owned but Catholic-affiliated hospitals—may be willing to do just that. Of course, sometimes, having to identify as religious may function as a market check on exemption.<sup>178</sup> At

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<sup>175</sup> An affiliate is defined as "a person that directly or indirectly through one or more intermediaries controls, or is controlled by, or is under common control with" the religious organization. UTAH CODE ANN. § 16-6a-102 (Lexis 2017). "Control" in turn can be established through "contract" that allows "the direct or indirect possession of the power to direct or cause the direction of the management and policies of an entity." *Id.* § 16-6a-102(10). Contract plays an explicit role in Utah's housing nondiscrimination statute, which specifies that it will not apply to housing "owned by, operated by, or under contract with an affiliate" of a religious organization or "owned by or operated by a person under contract" with a religious organization. *Id.* § 57-21-3(2)(b)(ii)-(iv) (Lexis 2015).

<sup>176</sup> Stein, *supra* note 154.

<sup>177</sup> Coverage of Certain Preventive Services Under the Patient Protection and the Affordable Care Act, 80 Fed. Reg. 41,318, 41,326 (July 14, 2015).

<sup>178</sup> *Spencer v. World Vision, Inc.*, 633 F.3d 723, 735 (9th Cir. 2011) ("While public religious identification will no doubt attract some . . . to the institution, it will dissuade others. In other words, it comes at a cost. Such market responses will act as a check on institutions that falsely identify themselves as religious merely to obtain . . . exemption . . . ." (quoting *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1344 (D.C. Cir. 2002))).

other times, however, market incentives may cut in favor of asserting religious identity and demanding exemption. Given that the public may not follow litigation closely,<sup>179</sup> the calculus may depend on the dollar value of exemption. Moreover, the cost of identifying as religious is likely to be fleeting; for example, consumers may refrain from shopping at Hobby Lobby in the near term but return as its notoriety wanes.

Once accommodated, an institution may remain accommodated. Corporate religious identity and exemption may live on eternally in zombie religious institutions, despite the absence of an association of religious people or discernible religious message. This possibility countermands the assumption that a small, discrete set of religious objectors exists.

Such a fate seems even more likely with regard to judicial exemptions. With legislative protections, a corporation might become ineligible to claim exemption (for instance, if the statute required nonprofit status). Courts, by contrast, are unlikely to be called upon to revisit a decision granting religious exemption. Through inertia, judicial accommodation may endure even as the company changes hands. Nor, under *Hobby Lobby*, is it evident that a change in organization or ownership would divest the corporation of its religious identity. Religious exemption could be perpetual for RFRA purposes.

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Proponents of religious institutionalism might welcome the spread of religion through contract. Some might hold principled positions against the legal requirements, for example, to offer emergency contraception or to not discriminate on the basis of religion. They might thus applaud the way in which contracted-for religion undercuts those policies. However, as the next Part shows, contracted-for religious compliance belies the values of pluralism and voluntarism that religious institutions purport to embody.

### III. DESTABILIZING RELIGIOUS INSTITUTIONALISM

In theory and doctrine, religious institutionalism calls for a sphere of immunity of religious institutions from state interference. This “freedom of the church” grants religious institutions special status in the social order to govern their affairs and to define their own boundaries, as Section III.A

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<sup>179</sup> Brian M. Murray, *The Elephant in Hosanna-Tabor*, 10 GEO. J.L. & PUB. POL’Y 493, 517 n.172 (2012) (“[C]onsidering such market concerns by organizations would seem to assume that individual consumers or employees actually pay attention to litigation.”); see also Brandon S. Boulter, *Goldilocks and the Three-Judge Panel: Spencer v. World Vision, Inc. and the Religious Organization Exemption of Title VII*, 2011 BYU L. REV. 33, 44 (“This may allow secular entities to redefine themselves as ‘religious’ and thereby receive undeserved exemption from certain requirements of Title VII . . .”).

describes. Proponents of religious institutionalism base their claims to broad institutional autonomy on values of pluralism and voluntarism. According to this view, robust institutional protection leads to the flourishing of diverse institutions, alternative sources of authority, and individual liberty.

Extended into the commercial realm, however, religious institutionalism loses its theoretical grounding. Autonomy for commercial actors from generally applicable laws is unlikely to foster pluralism or nourish individual free exercise. As Section III.B explains, wealthy religious entities can instead corner the market on religious compliance, driving out other religious groups and secular options. Section III.C argues that voluntarism also proves elusive once religious institutionalism spreads into commerce. Fundamentally, Section III.D contends, as institutions characterized by disparate goals, membership, and organizational forms adopt religious identity and seek exemption, they put epistemic pressure on the category of religious institution. Under such circumstances, the realm of institutional autonomy may shrink rather than swell. The rise of zombie religious institutions may require culling back religious exemptions in courts and legislatures.

#### *A. The Freedom of the Church*

Religious institutions have long been understood to advance and safeguard religious liberty. In traditional liberal theory, their rights of free exercise are understood in associational terms. Institutions enjoy rights by virtue of aggregating and advancing the consciences of individuals.<sup>180</sup> Churches foster and encourage individual free exercise by congregants who voluntarily join. Echoing this theory, the Supreme Court has previously taken the perspective that individual religious freedom flourishes where church affiliates exercise religion.<sup>181</sup>

In recent years, however, religious liberty doctrine and theory have taken a distinctly institutional turn. In its 2012 *Hosanna-Tabor* decision, the Supreme Court decided that religious institutions need not comply with antidiscrimination law when it comes to employees who are ministers—recognizing a doctrine known as the “ministerial exception” under the Establishment and Free Exercise Clauses of the First Amendment.<sup>182</sup> Carving out a sphere free from regulation, the Court emphasized institutional freedom

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<sup>180</sup> See *supra* note 101 and accompanying text.

<sup>181</sup> *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 342 (1987) (Brennan, J., concurring in the judgment).

<sup>182</sup> 565 U.S. 171, 188 (2012); see *supra* note 113.

rather than the associational interests of religious individuals.<sup>183</sup> While *Hosanna-Tabor* is the high-water mark of religious institutionalism, a number of the Court's recent religious liberty cases reflect a focus on institutional autonomy.<sup>184</sup> Legal scholars similarly argue that institutions—not individuals—lie at the core of the First Amendment.<sup>185</sup>

By contrast to traditional liberal theory, this new religious institutionalism claims a near-absolute or presumptive autonomy of religious institutions from regulation.<sup>186</sup> Religious institutionalists claim that religious entities require exemptions from antidiscrimination laws, insurance mandates, and hospital regulations under constitutional doctrine and statutory regimes.<sup>187</sup> From this perspective, legislative exemptions of religious institutions reflect their entitlement to independence in their own affairs.

Religious institutionalists base their claims to broad institutional autonomy on values of pluralism and voluntarism.<sup>188</sup> In contrast to the impersonal ties of state authority, religious institutions are thought to form

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<sup>183</sup> *Hosanna-Tabor*, 565 U.S. at 184 (“By forbidding the ‘establishment of religion’ and guaranteeing the ‘free exercise thereof,’ the Religion Clauses ensured that the new Federal Government—unlike the English Crown—would have no role in filling ecclesiastical offices. The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own.”).

<sup>184</sup> See, e.g., *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (regarding nonprofit employer challenge to contraceptive mandate); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (regarding for-profit employer challenge to contraceptive mandate); see also B. Jessie Hill, *Kingdom Without End? The Inevitable Expansion of Religious Sovereignty Claims*, 20 LEWIS & CLARK L. REV. 1177, 1180 (2017) (arguing that *Hosanna-Tabor*, *Hobby Lobby*, and *Zubik* are “united by a common thread of argument—namely, that religious institutions, because of their religious identity, are to some extent immune from regulation by the secular state”).

<sup>185</sup> See, e.g., Garnett, *supra* note 6, at 293 (“[A]n appropriately institutional approach to the Religion Clauses would involve attention to the religious-freedom rights of religious entities.”); Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. C.R.-C.L. L. REV. 79, 109 (2009).

<sup>186</sup> See *supra* note 8 (compiling sources).

<sup>187</sup> DeBoer, *supra* note 33, at 1609 (“[R]eligious hospitals should be sheltered from the destructive force of taxation, the controlling influence of government, and the backdoor regulation of government.”); Richard W. Garnett et al., *How to Protect Endangered Religious Groups You Admire*, CHRISTIANITY TODAY (Aug. 4, 2015), <http://www.christianitytoday.com/ct/2015/august-web-only/how-to-protect-endangered-religious-groups-you-admire.html> [<https://perma.cc/MJ3G-KC49>] (arguing in favor of the First Amendment Defense Act which would exempt nonprofit organizations receiving federal funding from requirements of nondiscrimination).

<sup>188</sup> Garnett, *supra* note 6, at 273; Richard W. Garnett, “*The Freedom of the Church*”: (Towards) An Exposition, Translation, and Defense, 21 J. CONTEMP. LEGAL ISSUES 33, 42 (2013) (observing that “‘freedom of the church’ . . . is a pluralistic claim”); Horwitz, *supra* note 185, at 104–09 (arguing that “sphere sovereignty offers an especially full and persuasive account of religious entities as First Amendment institutions”).

through organic, personal connections.<sup>189</sup> They foster pluralism, offering a sphere of authority separate and perhaps coequal to the state.

Religious institutionalists stress that autonomy from state interference leads to pluralism in two senses. First, they expect diverse perspectives among people and institutions. The results of religious institutionalism are “healthy, independent, free, diverse institutions”<sup>190</sup> and “a profusion of organically developed institutions and associations.”<sup>191</sup> Even among for-profit corporations, some argue, “moral pluralism” becomes possible through exemption from state regulation.<sup>192</sup> On this view, minimizing regulation of religious institutions proves socially valuable not only in reducing conflict, but also in encouraging religious and secular views separate from the state.<sup>193</sup> As Professor Angela Carmella puts it, “[e]xemptions may be fully consistent with the state’s public order function and the larger common good, particularly when they allow institutions in civil society to engage in socially responsible, stabilizing and beneficial activities.”<sup>194</sup> In healthcare in particular, “the institutional autonomy of religious hospitals” should generate societal benefits in the form of “divergent organizational identities.”<sup>195</sup> To fail to grant religious autonomy to religious entities, by contrast, allows for a totalizing state and limits associational diversity.

Religious institutionalism embraces pluralism in a second sense, as sources of authority independent from the secular political authority, whose reach then is necessarily limited.<sup>196</sup> This view of authority is quite robust on some perspectives. As Professor Richard Garnett describes it, religious institutions “exercise within the area of their competence an authority so

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<sup>189</sup> JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? 149 (1996) (“The church is usually viewed as a kind of unified whole, different from the sum of its parts. The glue that holds it together is not contractual.”).

<sup>190</sup> Garnett, *supra* note 6, at 293.

<sup>191</sup> Horwitz, *supra* note 185, at 84.

<sup>192</sup> Robert K. Vischer, *Individual Rights vs. Institutional Identity: The Relational Dimension of Conscience in Health Care*, 9 AVE MARIA L. REV. 67, 68, 73–74 (2010) [hereinafter Vischer, *Individual Rights*].

<sup>193</sup> See, e.g., Kathleen A. Brady, *Religious Organizations and Free Exercise: The Surprising Lessons of Smith*, 2004 BYU L. REV. 1633, 1677 (“The diversity of religious beliefs . . . presupposes a diversity of religious communities, each of which is able to structure its own internal life according to its own unique religious views and perspectives.”).

<sup>194</sup> Angela C. Carmella, *Responsible Freedom Under the Religion Clauses: Exemptions, Legal Pluralism, and the Common Good*, 110 W. VA. L. REV. 403, 408 (2007).

<sup>195</sup> Vischer, *Individual Rights*, *supra* note 192, at 78–79.

<sup>196</sup> Perry Dane, *The Maps of Sovereignty: A Meditation*, 12 CARDOZO L. REV. 959, 998 (1991) (discussing question of “why the state should recognize the juridical dignity of other legal orders” and vice versa).

effective as to justify labeling it a sovereign authority.<sup>197</sup> From this perspective, institutional exemptions—whether judicial or legislative—promote values of institutional self-definition. They also may serve antiestablishment values, maintaining a wall of separation between church and state.<sup>198</sup> Civil society becomes populated with religious organizations as a counterweight to the government.

Religious institutionalism also emphasizes voluntarism. On this view, freedom for religious institutions furthers the religious exercise of individuals because it protects their voluntary decisions to enter (or exit) such communities.<sup>199</sup> Without “churches” defined to encompass an array of nonstate actors, individuals lack meaningful freedom of conscience.<sup>200</sup> Religious institutions accordingly mediate between individuals and the

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<sup>197</sup> Richard W. Garnett, *Religious Accommodations and—among—Civil Rights: Separation, Toleration, and Accommodation*, 88 S. CAL. L. REV. 493, 503–04 (2015) (quoting Mark DeWolfe Howe, *The Supreme Court, 1952 Term—Foreword: Political Theory and the Nature of Liberty*, 67 HARV. L. REV. 91, 91 (1953)); see also Thomas Berg et al., *Religious Freedom, Church–State Separation, and the Ministerial Exception*, 106 NW. U. L. REV. COLLOQUY 175, 176 (2011) (“The civil authority—that is, the authority of a constitutional government—lacks ‘competence’ to intervene in such questions, not so much because they lie beyond its technical or intellectual capacity, but because they lie beyond its jurisdiction.”).

<sup>198</sup> For example, Congress exempted church plans from ERISA in part because the examination of a church’s books might be regarded as “an unjustified invasion of the confidential relationship that is believed to be appropriate with regard to churches and their religious activities.” S. REP. NO. 93-383, at 160 (1973).

<sup>199</sup> Angela C. Carmella, *After Hobby Lobby: The “Religious For-Profit” and the Limits of the Autonomy Doctrine*, 80 MO. L. REV. 381, 416 (2015) [hereinafter Carmella, *After Hobby Lobby*]; see also Zoë Robinson, *What is a “Religious Institution”?*, 55 B.C. L. REV. 181, 228 (2014) (“[V]oluntariness must at least mean that individuals know that they are entering into a religious institution and that they can exit at will.”).

<sup>200</sup> See Angela C. Carmella, *Mary Ann Glendon on Religious Liberty: The Social Nature of the Person and the Public Nature of Religion*, 73 NOTRE DAME L. REV. 1191, 1211–12 (1998) (stating that “protecting religious freedom in part through the prohibition on religious establishments ensures that religious associations are free from governmental control so that religious choice is ‘both possible and meaningful’”); Richard W. Garnett, *Religion and Group Rights: Are Churches (Just) Like the Boy Scouts?*, 22 ST. JOHN’S J. LEGAL COMMENT. 515, 532 (2007) (arguing that religious freedom for any individual depends on “a civil-society landscape that is thick with churches (and mediating institutions and associations of all kinds) and by legal rules that acknowledge and capture their importance”); Vischer, *Individual Rights*, *supra* note 192, at 73 (calling “institutional liberty . . . essential for the long-term flourishing of conscience”).

state.<sup>201</sup> They ensure the robust protection of individual religious exercise<sup>202</sup> and act as bulwarks against an overweening state.<sup>203</sup>

In classic liberal theory, churches are characterized by free and voluntary choices of individuals to join together.<sup>204</sup> Religious institutionalism sounds in this republican theory,<sup>205</sup> but it differs in that it describes an institution as “more than the sum of its parts.”<sup>206</sup> According to this claim, religious institutions have intrinsic as well as instrumental value and prove uniquely able to protect individual conscience through their independent and autonomous existence.<sup>207</sup> Their autonomy proves distinguishable from the rights of the individuals who constitute the whole. Religious institutions thus are not just like other associations but play a distinctive role in the social order.

While they often describe their theory as “freedom of the church,” proponents of institutional autonomy have always included a broader category of entities—including charities and, typically, healthcare providers—within the scope of religious institutional autonomy. *Hosanna-Tabor*, for example, emphasized the autonomy of a “church” but did so in the case of a school.<sup>208</sup> Courts have held that the ministerial exception applies

<sup>201</sup> See, e.g., GARVEY, *supra* note 189, at 153 (“Religious groups are one of the most important of those associations that stand intermediate between the individual and the state, and provide a buffer that is the best protection for personal freedom . . .”); Horwitz, *supra* note 185, at 83 (“These institutions serve as a counterweight to the state, ensuring that it ‘may never become an octopus, which stifles the whole of life.’” (quoting ABRAHAM KUYPER, LECTURES ON CALVINISM 96 (photo. reprint 1999) (1931))); see also *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 199 (2012) (Alito, J., concurring) (“[T]he autonomy of religious groups, both here in the United States and abroad, has often served as a shield against oppressive civil laws.”).

<sup>202</sup> Robinson, *supra* note 199, at 213 (“[R]eligious institutions facilitate religious individuals’ exercise of their First Amendment liberties. In this way, religious institutions act as intermediaries and hold rights only for the purpose of promoting individual liberties and ensuring the protection of individual interests.”).

<sup>203</sup> See, e.g., Garnett, *supra* note 6, at 295 (“It remains the case, though, that the existence and independence of religious institutions—self-defining, self-governing, self-directing institutions—are needed, as John Courtney Murray put it, to ‘check the encroachments of secular power and preserve [the] immunities’ of our ‘basic human things.’” (alteration in original) (quoting JOHN COURTNEY MURRAY, WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION 204 (1960))).

<sup>204</sup> See JOHN LOCKE, A LETTER CONCERNING TOLERATION 28 (James H. Tully ed., Hackett Publ’g Co., 1983) (1689).

<sup>205</sup> But see Schragger & Schwartzman, *supra* note 8, at 22–23 (criticizing the use of republican theory as “misplaced” given republicans’ deep skepticism of hierarchical corporate institutions including churches).

<sup>206</sup> Robinson, *supra* note 199, at 217.

<sup>207</sup> Horwitz, *supra* note 185, at 121 (“Religious entities are protected as a part of the social landscape not simply because they are instrumentally valuable, but because they are intrinsically valuable, and a fundamental part of a legally pluralistic society.”).

<sup>208</sup> 565 U.S. 171, 190–94 (2012).

to hospitals, nursing homes, social service providers, and beyond.<sup>209</sup> Entities removed from the core “church” have benefited from judicial deference to claims of religious identity and entitlement to statutory exemption.<sup>210</sup> As Professor Jessie Hill argues, “advocates of robust sovereignty for religious institutions are generally not eager to set out clear limits on that sovereignty, and indeed, most of them have not done so.”<sup>211</sup> Instead, the theory holds, religious institutions have the authority to determine their own boundaries and to define themselves independent from the state.<sup>212</sup>

Once religious institutionalism extends into commerce, however, principles of pluralism, voluntarism, and self-definition founder. As the next Sections show, contracted-for religion and the zombies it generates impede diverse organizations and sources of authority, coerce individuals, and threaten any special status religious entities once had.

### *B. Religious Market Dominance*

The experience of religious institutions in healthcare flies in the face of pluralism as a justification for religious institutionalism. Contracting religion can result in hegemony. The most powerful business can use its market position to propagate its faith to the detriment of institutional pluralism. Institutions—both religious and secular—can converge toward religious doctrine through commerce, not conversion. Unlike churches that actively and authoritatively interpret moral values, these institutions may passively comply with contract.

Like religious institutionalists, some healthcare scholars have expressed concerns that state regulation and market forces are totalizing with regard to religious institutions. Exploring isomorphism in the healthcare industry, scholars have long noted that for-profit and nonprofit hospitals come to adopt similar missions and characteristics.<sup>213</sup> And ownership changes through

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<sup>209</sup> See, e.g., *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 227 (6th Cir. 2007) (precluding ADA claims of resident in clinical pastoral education program in hospital); *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299, 309–11 (4th Cir. 2004) (preventing kosher supervisor from proceeding with Fair Labor Standards Act wage claim against Jewish nursing home); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 470 (D.C. Cir. 1996) (barring sex discrimination claim under Title VII); *Scharon v. St. Luke’s Episcopal Presbyterian Hosps.*, 929 F.2d 360, 363 (8th Cir. 1991) (barring hospital chaplain’s sex and age discrimination claims).

<sup>210</sup> See *infra* notes 281–84 and accompanying text (discussing ERISA church plan exemptions).

<sup>211</sup> Hill, *supra* note 184, at 1195.

<sup>212</sup> See, e.g., Garnett, *supra* note 6, at 295 (describing religious institutions as “self-defining, self-governing, self-directing institutions”).

<sup>213</sup> White, *supra* note 41, at 214 (“According to many observers, this metamorphosis of the Catholic health care tradition has yielded organizations that more closely resemble other nonprofit and/or for-profit health care providers.”).

mergers and acquisitions can drive such convergence.<sup>214</sup> The scholarly literature frequently notes that religious nonprofits might lose their special nature as they become like secular for-profits.<sup>215</sup> Professor Kathleen Boozang, for example, has argued that cost control mechanisms, competition, regulation, and affiliation pressures “threaten[ed] to diminish, if not completely erode, the ability of sectarian hospitals and nursing homes to maintain control over the kinds of medical care that they provide.”<sup>216</sup> Convergence, scholars have assumed, runs only in one direction.

But, as Part I suggested, Catholic healthcare has enjoyed considerable financial success in a consolidating market. Between 2001 and 2016, as the number of acute care hospitals dropped by 6%, the number of Catholic-owned or -affiliated acute care hospitals increased by 22%.<sup>217</sup> In buying and selling, Catholic healthcare systems have populated the market with secular healthcare entities subject to Catholic restrictions.

For other religious healthcare providers, affiliations with Catholic healthcare frequently prove totalizing, even when they initially purport not to be. For example, in 2005, in what was heralded as “a rare union of Catholic and Jewish healthcare providers,” Caritas Health Services and Jewish Hospital HealthCare Services formed a joint venture whose terms, drafted by a Jewish rabbi and a Catholic theologian, purported to maintain the religious traditions of each.<sup>218</sup> The Catholic hospitals would remain Catholic and subject to the ERDs, and the Jewish hospitals would retain their religious values.<sup>219</sup> Subsequently, the new entity merged again, forming KentuckyOne Health, which agreed to continue the facilities’ respective religious identities in a way that “honors the rich Jewish and Catholic heritages of its two sponsors.”<sup>220</sup> Immediately, however, the Jewish facilities and the many affiliated physician groups (including some of Louisville’s largest obstetrics and gynecology (OB–GYN) practices) received a memo that, on “Day One”

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<sup>214</sup> Guy David, *The Convergence Between For-Profit and Nonprofit Hospitals in the United States*, 9 INT’L J. HEALTH CARE FIN. & ECON. 403, 422 (2009).

<sup>215</sup> White, *supra* note 41, at 231 (“If Catholic health care is to survive the uncertainty and radical changes that are occurring in the architecture of health care delivery, more resources must be invested in the services they deliver in order to clarify the ways in which they are distinctive.”).

<sup>216</sup> Boozang, *supra* note 37, at 1430–31.

<sup>217</sup> UTTLEY & KHAIKIN, *supra* note 16, at 3; *see also* Nina Martin, *The Growth of Catholic Hospitals, By the Numbers*, PROPUBLICA (Dec. 18, 2013, 3:33 PM), <http://www.propublica.org/article/the-growth-of-catholic-hospitals-by-the-numbers> [<https://perma.cc/NA7X-SXZP>] (noting that since 2011, the largest Catholic hospital networks have grown at least another 30%).

<sup>218</sup> Melanie Evans, *Catholic Jewish Deal in Ky.*, MOD. HEALTHCARE, Oct. 10, 2005, at 14, 14.

<sup>219</sup> *Id.*

<sup>220</sup> *JHSMH & SJHS Merge*, KENTUCKYONE HEALTH (Jan. 6, 2012), <http://www.kentuckyonehealth.org/body.cfm?id=18&action=detail&ref=174> [<https://perma.cc/U6GL-BYH5>].

of the merger, they must cease providing contraception, tubal ligations, vasectomies, and techniques commonly used for abortion and miscarriage management, unless permissible under Catholic doctrine.<sup>221</sup>

Like other religious perspectives, secular options may be excluded from the market. In Lane County, Oregon, for example, the Catholic health system holds 70% of the hospital market and has affiliations with a large but unknown percentage of physician groups that restrict care in accordance with doctrine.<sup>222</sup> In Bartlesville, Oklahoma, when Ascension acquired the one hospital in the city, it required its affiliated physicians (all but one OB–GYN) to cease prescribing contraceptives—a policy it walked back substantially after public outcry.<sup>223</sup>

Negotiated agreements for religiously restricted care may have had a significant but unappreciated effect on access to healthcare—reproductive and end-of-life care in particular. Granted, exemption of officially designated Catholic hospitals already decreases access to care. But the perpetuity of restrictions and their application to nonobjecting partner institutions suggest that access to contested care (abortion in particular) may be more severely limited than previously thought. Indeed, a recent empirical study found that when a secular hospital affiliates with a Catholic entity (whether it remains secular or not), the provision of reproductive healthcare is significantly affected.<sup>224</sup> Looking at inpatient discharge data in six high-population states, researchers found that Catholic affiliation reduced tubal ligations by 31%.<sup>225</sup> If we only look at Catholic institutions—though they are many—we may dramatically undercount the reach of religious restrictions.

Admittedly, for some religious institutionalists, the ideal is a dominant Church. But they predict a Church that dominates by virtue of conviction or at least tradition.<sup>226</sup> With regard to secular affiliates and zombie religious

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<sup>221</sup> Memorandum to Clinical Operations (ED, OR, Nursing, Pharmacy) Employees, Managers, Jewish Hosp. & St. Mary's HealthCare, Saint Joseph Health System, & Univ. of Louisville Hosp., Day One of Kentucky Newco – Fact Sheet (Dec. 15, 2011), <http://www.khpi.org/dwnlds/2012/day-one-newco.pdf> [<https://perma.cc/DKH7-GCG5>]; Laura Ungar, *Louisville Medical Practice Leaves KentuckyOne Health over Medical Restrictions on Birth Control*, COURIER-JOURNAL (Aug. 22, 2012), [http://resources.nortonhighlands.com/wp-content/uploads/2012/12/Louisville\\_medical\\_practice\\_leaves\\_KentuckyOne\\_Health\\_over\\_me.pdf](http://resources.nortonhighlands.com/wp-content/uploads/2012/12/Louisville_medical_practice_leaves_KentuckyOne_Health_over_me.pdf) [<https://perma.cc/3VA5-X72M>].

<sup>222</sup> Ikemoto, *supra* note 72, at 1102 n.84.

<sup>223</sup> *St. John Responds to Outcry*, EXAMINER-ENTERPRISE (Apr. 1, 2014, 9:21 AM), <http://examiner-enterprise.com/news/local-news/st-john-responds-outcry> [<https://perma.cc/QG4G-2CEM>].

<sup>224</sup> Hill et al., *supra* note 70, at 6–7 (broadly defining a hospital as Catholic if the hospital itself is designated Catholic, its ownership is Catholic, or the hospital's system is Catholic).

<sup>225</sup> *Id.* at 13.

<sup>226</sup> Vischer, *Individual Rights*, *supra* note 192, at 74 (“[T]he moral marketplace enlists actors in an ongoing conversation—and in a real sense, competition—regarding the good.”).

institutions, the religious entity does not persuade. Compliance results from the institution's economic strength.

Contracting for religion also challenges the second sense of pluralism urged by religious institutionalism—that is, of juridical authority separate from the state. Affiliates of Catholic healthcare and zombie Catholic hospitals do not represent the exercise of autonomous lawmaking that religious institutionalism celebrates. They simply follow rules in order to avoid breach of contract. Compliance with contract terms offers little ability to evolve and to interpret and apply religious authority in context. While officially designated, traditional Catholic hospitals have experts to answer ethical dilemmas or advocate for enhanced charitable care, affiliates and zombie hospitals adhere to contract in a formalistic way.

Indeed, the authority of established religious churches may even be undermined by zombie hospitals in ways that religious institutionalists would find troubling. Dignity Health, for example, denominates itself as Catholic even though the institutional Church disagrees.<sup>227</sup> Its St. Joseph hospital in Phoenix asserts Catholic identity despite revocation of Catholic status by the local bishop.<sup>228</sup>

In sum, the dominance of Catholic doctrine manifests not success in convincing people of its vision of the good life, but financial inducement to religious adherence. The result is a religiously homogenous market in which the flourishing of diverse alternative sources of authority goes unrealized.

### C. *Involuntary Associations*

Contract, of course, can be a way of recognizing and affirming common beliefs and shared commitments. Scholars regularly point to contract as a mark of voluntarism in relationships between commercial religious entities and employees.<sup>229</sup> Sometimes, they further argue that commercial firms function like traditional voluntary organizations, allowing employees to associate around a common goal—religious or not.<sup>230</sup>

Contract backed by threat of civil action, however, is not the hallmark of people united by shared religious belief. It again indicates problems for institutional autonomy in the commercial realm, where an entity can

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<sup>227</sup> See Press Release, Catholic Healthcare W., *supra* note 99.

<sup>228</sup> See Press Release, St. Joseph's Hosp. & Med. Ctr., *supra* note 98.

<sup>229</sup> Michael A. Helfand, *Religious Institutionalism, Implied Consent, and the Value of Voluntarism*, 88 S. CAL. L. REV. 539, 570 (2015) (stating that “religious institutionalism amounts to a constitutionally protected contract of sorts” founded on “the voluntary choice of individuals to join the religious institution”).

<sup>230</sup> *Id.* at 570–71 (“[W]hile the law generally does not allow individuals to waive certain statutorily protected rights, members are granted the constitutional authority to do so when it comes to joining religious institutions in order to promote the value of religious voluntarism.”).

purchase compliance with its authority instead of winning over constituents. The role of the dead hand in institutions to which ties have been cut proves particularly disturbing from the perspective of voluntarism. Sales contracts precommit a whole range of people to religious doctrine. Even if we were to assume that the original signatories shared the seller's religious beliefs, future providers, administrators, owners, and patients are unlikely to do so.

Contracts requiring adherence to religious doctrine affect three groups: business entities, individual healthcare providers, and patients. As to the first, administrators of Catholic health systems describe transactions with other healthcare entities with the rhetoric of voluntary choice and value alignment. From their perspective, buyers of Catholic hospitals are “groups who agree with us and wish to continue the type of care and types of policies” that Catholic systems require.<sup>231</sup> As the former president of the Catholic Health Association put it, “When you choose us, you choose who we are.”<sup>232</sup>

Deals between sophisticated corporate healthcare chains, however, bear little resemblance to an association based on shared values. As a conceptual matter, thinking of corporate consolidations as voluntary associations requires a move from aggregates of individuals to aggregates of entities. Ties between institutions are not affective, but detached, requiring “external coercion or inducement”—that is, legal enforcement and financial payment.<sup>233</sup> As a pragmatic matter, as an executive of Tenet Healthcare said, buyers of Catholic-run hospitals have no choice but to accept the directives.<sup>234</sup> Catholic sellers will not consider their offers without such commitment.<sup>235</sup>

Moreover, exit is constrained by threat of legal enforcement in a way that belies comparisons to voluntary associations. Recall, for example, the Caritas–Cerberus deal and its \$25 million liquidated damages clause meant to keep the for-profit owner of the formerly Catholic chain compliant with doctrine.<sup>236</sup> The difficulty of exit also is apparent from transactions between Catholic and non-Catholic healthcare that went sour. For example, the

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<sup>231</sup> FOGEL, *supra* note 64, at 5 (quoting Karen Brandon, *Ex-Catholic Hospitals Retain Restrictions*, CHI. TRIBUNE, Sept. 17, 2002).

<sup>232</sup> Deanna Bellandi, *What Hospitals Won't Do for a Merger*, MOD. HEALTHCARE, Sept. 29, 1998, at 28, 28 (quoting Rev. Michael Place, president of the Catholic Health Association).

<sup>233</sup> James D. Nelson, *Conscience, Incorporated*, 2013 MICH. ST. L. REV. 1565, 1579–81 (differentiating between individuals' identification with or detachment from an institution and arguing that “to secure compliance with the expectations that accompany a role distant from the self, that role must be accompanied by some sort of external coercion or inducement”).

<sup>234</sup> FOGEL, *supra* note 64, at 5.

<sup>235</sup> *Id.*

<sup>236</sup> See Caritas Christi Massachusetts Attorney General Statement, *supra* note 75, and accompanying text.

unwinding of the consortium of city-affiliated Bayfront Hospital with Catholic partners led to multiple lawsuits.<sup>237</sup> In another instance, Catholic and Lutheran hospitals in Denver formed the Exempla system pursuant to a joint operating agreement. Neither could exit unless all parties agreed to dissolution of the corporate structure.<sup>238</sup> Ten years later, an intractable conflict occurred. As the agreement allowed, Lutheran was not compliant with Catholic doctrine and provided a full range of end-of-life and reproductive care,<sup>239</sup> but as a result the Catholic partner refused to invest in facilities upgrades for the system.<sup>240</sup> After years of litigation, Lutheran finally succumbed, and Exempla became a fully Catholic system.<sup>241</sup>

At the provider level, contract similarly substitutes for shared faith as the primary mechanism of compliance. Through leases, admitting privilege agreements, employment contracts, and purchase agreements, healthcare systems require physicians, nurses, and other healthcare providers to restrict the care they provide patients based on religious positions they may not share.<sup>242</sup> Restrictions affect a large percentage of physicians.<sup>243</sup>

The use of contract seems to reflect a particular lack of alignment between providers and institutions. Twenty percent of physicians who practice at religious hospitals<sup>244</sup> and a full fifty-two percent of OB–GYNs who work in officially designated Catholic hospitals report conflicts over

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<sup>237</sup> Allison & Gilmer, *supra* note 48.

<sup>238</sup> Cinda Becker, *Exempla Board Opposes Deal*, MOD. HEALTHCARE, Oct. 29, 2007, at 8, 8.

<sup>239</sup> *Id.*

<sup>240</sup> Joe Carlson, *Offering Salvation: Ascension, Equity Firm Forge Deal They Say Could Save Catholic Hospitals*, MOD. HEALTHCARE (Feb. 21, 2011), <http://www.modernhealthcare.com/article/20110221/MAGAZINE/110219947> [<https://perma.cc/TJ9V-PTK8>].

<sup>241</sup> *Id.*

<sup>242</sup> *See, e.g.*, ERDs, *supra* note 20, at 12 (“Catholic health care services must adopt these Directives as policy [and] require adherence to them within the institution as a condition for medical privileges and employment . . . .”); Ungar, *supra* note 221 (describing a physician group departure from a healthy system after the purchase agreement resulted in religious restrictions on birth control); ELENA N. COHEN & ALISON SCLATER, NAT’L WOMEN’S LAW CENT., TRUTH OR CONSEQUENCES: USING CONSUMER PROTECTION LAWS TO EXPOSE INSTITUTIONAL RESTRICTIONS ON REPRODUCTIVE AND OTHER HEALTH CARE 6 (2003), <http://www.nwlc.org/sites/default/files/pdfs/TruthOrConsequences2003.pdf> [<https://perma.cc/XGM9-QQ6Y>] (“Catholic-owned medical office buildings sometimes require physicians to whom they lease to honor the *Directives* in those private physician offices, even though the physicians do not have any other relationship with the Catholic entity.”).

<sup>243</sup> Forty-three percent of physicians report having practiced in an officially religiously affiliated institution over the course of their careers, a large number of which had institutional policies of refusal. Debra B. Stulberg et al., *Religious Hospitals and Primary Care Physicians: Conflicts over Policies for Patient Care*, 25 J. GEN. INTERNAL MED. 725, 727 (2010).

<sup>244</sup> Some religious hospitals do not impose restrictions; this number, therefore, may understate the occurrence of conflicts between physicians and refusing hospitals over religious restrictions. *Id.*

religion-based policies for patient care.<sup>245</sup> Empirical studies show that such disagreement persists irrespective of shared faith.<sup>246</sup> That is, the rates of conflict of a Catholic physician and a non-Catholic physician with a Catholic hospital were approximately the same.

Frequently, providers do not knowingly or voluntarily seek work in Catholic healthcare settings. In interviews in a 2010 study, OB–GYNs reported that practice restrictions on the provision of abortion were not made clear to them at the time of their hiring.<sup>247</sup> Myriad examples of physicians leading protests against Catholic acquisitions show providers encountering religious restrictions in the context of consolidation.<sup>248</sup>

Lack of transparency in transactions between Catholic and non-Catholic entities undermines the notion that providers voluntarily embrace Catholic restrictions. In many deals between Catholic hospitals and secular corporations, terms went undisclosed.<sup>249</sup> In some cases, administrators proved unwilling to clarify which services were affected, even after a sale.<sup>250</sup> In numerous instances, institutions assured providers and the public that services would continue only to subsequently limit them in accordance with religious doctrine.<sup>251</sup> Even where the terms of the agreement were made clear, the Catholic contracting party (at least theoretically) could change the religious terms unilaterally, because agreements typically call for adherence to future amendments to, or new interpretations of, the directives.<sup>252</sup>

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<sup>245</sup> Debra B. Stulberg et al., *Obstetrician–Gynecologists, Religious Institutions, and Conflicts Regarding Patient-Care Policies*, 207 AM. J. OBSTETRICS & GYNECOLOGY 73.e1, 73.e4 (2012).

<sup>246</sup> Stulberg et al., *supra* note 243, at 728 (“Neither religious affiliation nor physician-institution congruence was significantly associated with having experienced conflict with religiously affiliated institutions.”).

<sup>247</sup> Lori Freedman et al., *Obstacles to the Integration of Abortion into Obstetrics and Gynecology Practice*, 42 PERSP. SEXUAL & REPROD. HEALTH 146, 148–50 (2010) (summarizing qualitative interviews with thirty OB–GYNs).

<sup>248</sup> See, e.g., Fogel & Rivera, *supra* note 72, at 725–26 (discussing the purchase of the sole community hospital in Gilroy, California, by Catholic Healthcare West in response to which physicians “organized, wrote letters to the editor, voted as a hospital staff to preserve sterilizations, and even appealed directly to the Bishop”).

<sup>249</sup> See REPORT OF THE KENTUCKY ATTORNEY GENERAL, *supra* note 60, at 10 (describing the complicated “evolution of the University’s explanation of to what degree the Hospital will be subject to the ERDs” that “has cast a cloud of vagueness and skepticism over the issue in the public eye”); Allison & Gilmer, *supra* note 48 (discussing the lack of notice to the city of terms of the consortium agreement between a Catholic and quasi-public hospital); Mueller, *supra* note 155 (reporting that former hospital employees were surprised to find that the buyer had not continued to fund their pension plans).

<sup>250</sup> See, e.g., Ungar, *supra* note 221 (reporting that physicians were refused specific answers to their questions about restrictions on care and could receive no assurance that they could continue to provide services).

<sup>251</sup> See, e.g., Cowan, *supra* notes 49–50 and accompanying text.

<sup>252</sup> FOGEL, *supra* note 64, at 5 (“The Asset Purchase Agreement for Santa Marta Hospital required compliance with certain of the *Directives*, as now approved by the National Conference of Catholic

Likewise, in converting pensions to ERISA-exempt church plans, hospitals and healthcare systems failed to notify the estimated tens of thousands of workers who thereby lost federal protections.<sup>253</sup> They did not seek employee ratification of the decisions. For example, the Hospital Center at Orange—the last remaining hospital in a New Jersey city that once had three—served as a secular community hospital for over 100 years.<sup>254</sup> In 1998, it became an affiliate of Catholic Cathedral Health System.<sup>255</sup> In 2002, the system applied for and received an IRS ruling converting the employee pension plan to a church plan.<sup>256</sup> It thus frustrated long-established expectations, including those of workers who likely accepted lower wages in return for a pension only to see it disappear.<sup>257</sup>

With regard to patients, theories of voluntarism prove particularly strained. An assumption of religious exemption (and indeed of religious institutionalism generally) has been that one had to choose to encounter religious institutions. As Professor Robert Vischer summarizes, “Churches, when viewed from the perch of state agnosticism, are optional pursuits. They do not govern access to wide swaths of employment or essential goods and services . . . .”<sup>258</sup> From the liberal perspective as well, as Professors Richard Schragger and Micah Schwartzman explain, “it is the very inconsequentiality of the church for the political and social status of its members that allows it to be so fully autonomous and free from state regulation.”<sup>259</sup>

By contrast to churches, healthcare institutions—religiously affiliated or not—serve to meet urgent and emergent human needs and operate in a field flush with federal and state funds. Hospital markets in particular lack competitiveness. As a result of mergers and the formation of massive healthcare systems, nearly half of hospital markets are highly concentrated

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Bishops, and as interpreted by the local Bishop, together with all amendments thereto from time-to-time hereafter.” (citation and internal quotation marks omitted)).

<sup>253</sup> See, e.g., Walsh, *supra* note 158 (reporting that employees at the Hospital Center at Orange were not notified when the I.R.S. issued a ruling recognizing the hospital’s pension as a “church plan”). Only in 2011 did the IRS begin to require employers to notify employees of applications for church plan status. Rev. Proc. 2011-44, 2011-39 I.R.B. 446.

<sup>254</sup> *Workers Covered by Church Plans Tell Their Stories*, PENSION RTS. CTR., <http://www.pensionrights.org/publications/fact-sheet/workers-covered-church-plans-tell-their-stories> [https://perma.cc/7YEG-3UR4].

<sup>255</sup> *Id.*

<sup>256</sup> Walsh, *supra* note 158.

<sup>257</sup> PENSION RTS. CTR., *supra* note 254.

<sup>258</sup> Robert K. Vischer, *Do For-Profit Businesses Have Free Exercise Rights?*, 21 J. CONTEMP. LEGAL ISSUES 369, 391 (2013) [hereinafter Vischer, *For-Profit Businesses*].

<sup>259</sup> Richard Schragger & Micah Schwartzman, *Against Religious Institutionalism*, 99 VA. L. REV. 917, 961–62 (2013) (emphasis omitted).

(uncompetitive) and none is highly competitive.<sup>260</sup> While religious institutionalists frequently describe the state as monopolistic and unavoidable, the “church,” too, may become so, especially in a market like healthcare that is largely local.

Given the market share of official and unofficial Catholic institutions, it is virtually inevitable that a patient will encounter major medical institutions with religiously restricted care. Almost one-third of officially designated Catholic hospitals serve rural populations.<sup>261</sup> Some enjoy “a practical, but not state-enforced, monopoly in obstetrical services.”<sup>262</sup> Even in urban areas, a religiously restricted hospital may be the only provider for a large population.<sup>263</sup> Especially where public–private partnerships are involved, the hospital may be the only option for nonemergency care for indigent or uninsured populations.<sup>264</sup>

Would-be patients likely do not seek out religiously affiliated hospitals even where competitors exist. Patients tend to choose hospitals based primarily on where their physicians practice, a choice more reflective of geography than religion.<sup>265</sup> Insurance plans often constrain patients’ options<sup>266</sup> and can be expected to continue to do so as the Affordable Care Act’s exchange plans adopt narrow networks of providers.<sup>267</sup>

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<sup>260</sup> David M. Cutler & Fiona Scott Morton, *Hospitals, Market Share, and Consolidation*, 310 J. AM. MED. ASS’N 1964, 1966 (2013).

<sup>261</sup> CATHOLIC HEALTH ASS’N OF THE U.S., *supra* note 31, at 2; *see also* UTTLEY & KHAIKIN, *supra* note 16, at 1 (“There are 46 Catholic-restricted hospitals that are the sole community providers of short-term acute hospital care for people living in their geographic regions.”).

<sup>262</sup> *Ham v. Holy Rosary Hosp.*, 529 P.2d 361, 365 (Mont. 1974); Patricia Donovan, *Hospital Mergers and Reproductive Health Care*, 28 FAM. PLAN. PERSPS. 281, 281 (1996) (noting that the merger of Leonard Hospital and St. Mary’s Hospital in Troy, New York, resulted in discontinuation of reproductive services for “financially and medically needy population in a three-county, largely rural area”); Fogel & Rivera, *supra* note 72, at 725–26 (discussing the impact on women in rural Gilroy, California, of the purchase of the sole community hospital by Catholic Healthcare West).

<sup>263</sup> *See, e.g.*, Wendt, *supra* note 77 (observing that a for-profit secular hospital bound by religious restrictions was “the only hospital in a large area of Chicago”).

<sup>264</sup> Rob Boston, *Emergency! How a City-Owned Hospital in Florida Wound Up Operating Under the Catholic Bishops’ Control and What Americans United and Its Allies are Doing About It*, CHURCH & ST. (Oct. 2000), <https://www.au.org/church-state/october-2000-church-state/featured/emergency> [<https://perma.cc/5S33-TLL3>] (alleging that following the city hospital’s participation in a consortium with a Catholic hospital, a woman whose sonogram revealed that her fetus had no bladder or kidneys and severely under-developed lungs was refused an abortion and had to carry to term a fetus that survived for thirty minutes).

<sup>265</sup> Debra B. Stulberg et al., *Tubal Ligation in Catholic Hospitals: A Qualitative Study of Ob–Gyns’ Experiences*, 90 CONTRACEPTION 422, 427 (2014).

<sup>266</sup> *Id.* at 426 (reporting that a plaintiff’s insurance plan covered only the local Catholic hospital, requiring her to wait to switch insurers and undergo a second surgery rather than receive a tubal ligation following her delivery).

<sup>267</sup> *See, e.g.*, John Geyman, *High Deductibles and Narrow Networks: The Achilles Heel of the ACA’s Health Insurance*, HUFFINGTON POST (published Dec. 22, 2015, 1:43 PM; updated Dec. 22, 2016),

Moreover, public polling shows that women do not expect even Catholic-designated hospitals to refuse care for religious reasons; the majority anticipates finding a full range of reproductive health services regardless of religious affiliation, and 45% believe they would be able to obtain medical services that go against Catholic religious teachings.<sup>268</sup> A smaller study found that a majority of women “expected that their gynecologist would provide the range of family planning care surveyed” regardless of the religious or secular nature of the institution: “[o]ver 90% of participants expected to receive short- and long-acting reversible contraceptive methods” at a Catholic facility.<sup>269</sup>

As hospitals merge and affiliate with one another, potential patients or employees may not even recognize that a facility is religiously affiliated.<sup>270</sup> Catholic restrictions must be followed in “St. Luke’s Episcopal Health System” and “Jewish Hospital.”<sup>271</sup> While hospitals linked to the Catholic Church through sponsorship agreements appear on official rosters of Catholic hospitals, hospitals that comply with restrictions through partnerships or following sales go unidentified. Once sold to a secular buyer, formerly Catholic hospitals may no longer retain any outward sign of religiosity. Across categories of institutions (whether officially religiously designated or zombie hospitals), hospitals do not advertise the services they do not provide. Yet the vast majority of women want to know this information.<sup>272</sup> Determining whether a hospital (or physicians’ group or other facility) adheres to religious doctrine proves no easy feat, even for the most informed observers of religious healthcare.

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[http://www.huffingtonpost.com/john-geyman/high-deductibles-and-narr\\_b\\_8862762.html](http://www.huffingtonpost.com/john-geyman/high-deductibles-and-narr_b_8862762.html)  
[<https://perma.cc/RKR6-5UCD>] (“Narrow networks have become endemic under the ACA . . .”).

<sup>268</sup> BELDEN RUSSONELLO & STEWART, RELIGION, REPRODUCTIVE HEALTH AND ACCESS TO SERVICES: A NATIONAL SURVEY OF WOMEN 1 (2000) (produced for Catholics for a Free Choice), <http://www.catholicsforchoice.org/wp-content/uploads/2014/01/2000religionreproductivehealthandaccessstoservices-1.pdf> [<https://perma.cc/53U4-7WNP>].

<sup>269</sup> Maryam Guiahi et al., *Are Women Aware of Religious Restrictions on Reproductive Health at Catholic Hospitals? A Survey of Women’s Expectations and Preferences for Family Planning Care*, 90 CONTRACEPTION 429, 431 (2014).

<sup>270</sup> *St. Thomas Health Renaming Baptist, Other Hospitals*, WSMV (published Jul. 11, 2013, 5:20 AM; updated July 25, 2013, 5:20 AM), <http://www.wsmv.com/story/22812676/st-thomas-expected-to-rename> [<https://perma.cc/VR44-47TF>] (reporting on the renaming of Baptist Hospital to Saint Thomas Midtown because, after 11 years, “most people don’t know the systems are affiliated”). Other rebranded hospitals include Middle Tennessee Medical Center, Hickman Community Hospital, and the Hospital for Spinal Surgery.

<sup>271</sup> UTTLEY ET AL., *supra* note 31, at 8.

<sup>272</sup> Lori R. Freedman et al., *Religious Hospital Policies on Reproductive Care: What Do Patients Want to Know?*, 218 AM. J. OBSTETRICS & GYNECOLOGY 251.e1, 251.e1 (2017) (reporting that 80.7% of women want to know about religious restrictions on care).

Concerns over the creation of monopolies, lack of voluntarism, and absence of transparency and choice exist even with regard to officially designated Catholic hospitals. But when institutions adopt religion for commercial gain, countervailing values of institutional exemption—such as the religious liberty of any particular individuals or the autonomy of any identifiable church—are absent.

#### D. *The End of Religious Exemption in Commerce?*

The spread of religion in commerce poses a crisis for the religious institutionalism that seemed triumphant post-*Hosanna Tabor*. The Supreme Court's decision in *Burwell v. Hobby Lobby* began to expose the cracks in the foundation of religious institutionalism. In that case, a multibillion-dollar, for-profit corporation with tens of thousands of employees gained a right to the free exercise of religion and, indeed, to exemption from otherwise-applicable laws under RFRA, equal to other religious institutions.<sup>273</sup> Dismissing the possibility that religious identity might spread through the corporate world, the Court opined that “the idea that unrelated shareholders—including institutional investors with their own set of stakeholders—would agree to run a corporation under the same religious beliefs seems improbable.”<sup>274</sup> The healthcare industry shows that the Court was mistaken.

Through contract, for-profit and nonprofit, commercial and noncommercial, and sacred and secular institutions can become newly religious. Defined so broadly, the religious institution seems to lose whatever special character it once had. Several proponents of robust institutional exemptions have themselves begun to warn that “the expansion of autonomy to include for-profits threatens to dilute the entire doctrine, which could result in the loss of protections for churches on core matters of identity and mission.”<sup>275</sup> Across institutions, courts may renounce their historical disengagement from definitional questions with regard to religion. They may inquire more deeply into the character of institutions and limit constitutional and statutory exemptions.

As the category of religious institution broadens, traditional doctrinal deference to claims of religion comes under strain. As a matter of black letter

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<sup>273</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

<sup>274</sup> *Id.* at 2774.

<sup>275</sup> Carmella, *After Hobby Lobby*, *supra* note 199, at 381; *see also* Robinson, *supra* note 199, at 231 (“If judges are forced to choose between letting everyone in a broad institutional category have sovereign rights or no one, they will inevitably choose no one.”); Vischer, *For-Profit Businesses*, *supra* note 258, at 387 (“[T]he legitimate public policy concerns raised by for-profit businesses as free exercise claimants could diminish protections for all free exercise claimants, including churches, unless sensible distinctions based on corporate form are drawn.”).

law, the Establishment Clause prohibits “excessive entanglement” between the government and religious actors.<sup>276</sup> Courts thus refrain from resolving doctrinal controversies and interfering in ecclesiastical disputes.<sup>277</sup> The Supreme Court has deferred, for example, to authorities of hierarchical churches in particular as to the proper ownership of church property, leadership, and administration.<sup>278</sup> Several judges have suggested that even distinguishing between secular and religious activities or products might result in extensive entanglement of government in religious affairs.<sup>279</sup> This “Establishment Clause Creep,” as Professors Michael Helfand and Barak Richman call it, has meant “a growing tendency by courts to interpret the Establishment Clause expansively to preclude adjudication of co-religionist disputes that, at their core, are commercial in nature.”<sup>280</sup>

The case study of healthcare provides additional evidence of such creep. In evaluating ERISA church plans, a number of lower courts refused to inquire into the religious identity of healthcare systems, including those that bring together religious and nonreligious hospitals.<sup>281</sup> Inquiring further into religious convictions, one court said, would “run afoul of the First Amendment” and require courts to “delve into the doctrinal particulars of Catholic orthodoxy.”<sup>282</sup> When employees disputed the designation of Ascension’s pension as a church plan given its lack of control by the Catholic Church and its for-profit ventures, another district court decided that its consideration of this argument was “prohibited by the Constitution.”<sup>283</sup> The

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<sup>276</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 613–14 (1971).

<sup>277</sup> *See Serbian E. Orthodox Diocese v. Milivojevic*, 426 U.S. 696, 714 n.8 (1976) (“Civil judges obviously do not have the competence of ecclesiastical tribunals in applying the ‘law’ that governs ecclesiastical disputes . . .”); *see also* *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 729 (1871) (“It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of [church] bodies as the ablest men in each are in reference to their own.”).

<sup>278</sup> *Milivojevic*, 426 U.S. at 697–98, 710 (noting that deference to church decisions over property “appl[y] with equal force to church disputes over church polity and church administration”); *Watson*, 80 U.S. (13 Wall.) at 724–27.

<sup>279</sup> *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 343 (1987) (Brennan, J., concurring in the judgment) (“[D]etermining whether an activity is religious or secular requires a searching case-by-case analysis. This results in considerable ongoing government entanglement in religious affairs.”); *Spencer v. World Vision, Inc.*, 633 F.3d 723, 730 (9th Cir. 2011) (indicating that any test of religious exemption under Title VII that “take[s] into account the ‘religious’ or ‘secular’ nature of a particular product or service” would mean “venturing into this constitutional minefield”).

<sup>280</sup> Helfand & Richman, *supra* note 12, at 776; *see also* Bernadette Meyler, *Commerce in Religion*, 84 NOTRE DAME L. REV. 887, 912 (2009) (“In many—and perhaps an increasing number of—instances, religion overlaps with the commercial sphere and courts are obligated to determine whether or not to adopt an entirely hands-off approach simply because the specter of religion lurks on the horizon.”).

<sup>281</sup> *See, e.g., Medina v. Catholic Health Initiatives*, 147 F. Supp. 3d 1190, 1203 (D. Colo. 2015).

<sup>282</sup> *Id.* at 1202.

<sup>283</sup> *Overall v. Ascension*, 23 F. Supp. 3d 816, 832 (E.D. Mich. 2014).

court invoked the autonomy-based arguments of religious institutionalists, saying that “[t]he First Amendment creates a protected zone for churches to decide these issues of religious doctrine free from government intrusion.”<sup>284</sup>

Out of fear of entanglement, courts also have disregarded the conflicts that institutions with dual religious identities create.<sup>285</sup> In *Medina v. Catholic Health Initiatives*, for example, a fifty–fifty joint venture between Catholic and Adventist Health Systems was granted a church plan exemption on the basis of the venture’s association with the Catholic Church.<sup>286</sup> One religion subsumed the other. The court proved unwilling to inquire into religiosity even though the institution had a dual-faith identity.

While courts cannot resolve questions of religious doctrine,<sup>287</sup> they also hesitate to inquire into the importance of belief to a religion. They rarely examine plaintiffs’ sincerity or consistency outside of the context of prisoners’ demands for exemption.<sup>288</sup> For example, with regard to RFRA, which requires that plaintiffs have a sincere religious belief and that their free exercise be substantially burdened in order to shift the burden of proof to the government, courts may simply defer to plaintiffs. Indeed, after *Hobby Lobby*, courts may have to accept a plaintiff’s assertion that a law substantially burdens its religion—ultimately permitting a religious objector to subject regulation to strict scrutiny based on its word alone.<sup>289</sup>

Having endorsed this hands-off approach from courts (and legislatures), religious institutionalists should be wary of widening the category of religious institution. Extended beyond houses of worship, the category of religious institutions becomes unstable. As Professor Zoë Robinson observes, when borderline institutions gain the same footing as core religious institutions, “the purposes for the special recognition of religious institutions under the First Amendment become blurred.”<sup>290</sup> In turn, the incapacity of

<sup>284</sup> *Id.*

<sup>285</sup> *Scharon v. St. Luke’s Episcopal Presbyterian Hosps.*, 929 F.2d 360, 362 (8th Cir. 1991) (concluding that a hospital was entitled to the ministerial exception under the Constitution in part because two churches of different faith traditions nominated the board of directors and had to approve changes to the articles of association).

<sup>286</sup> *Medina*, 147 F. Supp. 3d at 1203.

<sup>287</sup> *See, e.g.*, *Thomas v. Review Bd. of Ind. Emp’t Sec. Div.*, 450 U.S. 707, 716 (1981) (“[I]t is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.”).

<sup>288</sup> Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts over Religious Property*, 98 COLUM. L. REV. 1843, 1847–52 (1998) (discussing “The Origin of a ‘Hands-Off’ Approach”).

<sup>289</sup> 134 S. Ct. 2751, 2778 (2014) (finding the contraceptive mandate imposed a substantial burden on the plaintiffs’ beliefs in part because “the federal courts have no business addressing (whether the religious belief asserted in a RFRA case is reasonable”).

<sup>290</sup> Robinson, *supra* note 199, at 231.

civil authorities to intervene—whether framed as institutional sovereignty or hands-off doctrine—“begins to look significantly more troubling.”<sup>291</sup>

Today, courts might rethink deferring to a religious institution (or to the Church) on the issue of religious identity. As this Article demonstrates, some hospitals have disaffiliated with the Vatican but remain sponsored by an order of women religious.<sup>292</sup> Others have been acquired by institutional for-profit investors but retain their official Catholic designation.<sup>293</sup> Others are acknowledged to be secular but nonetheless are bound to follow Catholic doctrine.<sup>294</sup> Granting these institutions statutory license or constitutional autonomy to avoid the state’s power undermines other societal goals and constitutional constraints.

ERISA litigation provides some evidence that courts will reject the hands-off approach and narrow the exemption when institutions overreach. The Ninth Circuit, for example, explicitly rejected the hands-off argument of a healthcare system that sought to set up church plans independent of churches. Dignity Health had argued that “the determination whether an organization qualifies as a church requires a forbidden inquiry into matters of religious doctrine,” barred by the Establishment Clause.<sup>295</sup> The Ninth Circuit firmly disagreed.<sup>296</sup> It further concluded that, regardless of whether a church’s organizational form is a matter of “internal church decision,” ERISA’s church plan exemption permits any church the freedom to “operate their agencies under the same organizational structure as their churches” or to separate them.<sup>297</sup> In other words, a church can organize so as to make its associated entities eligible for church plan status. Having failed to do so, however, it could not then claim exemption.

Lower federal courts recently have become wary of the effects of religious institutionalism in commerce in the ERISA context. In the past, they tended to avoid constitutional questions by interpreting the statute to require that only a church, as opposed to an affiliated hospital, could establish a church plan—an approach the Supreme Court brought to a halt in 2017. For example, the Seventh Circuit rejected the church plan status of a healthcare system employing over 33,000 people and affiliated with both the

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<sup>291</sup> Hill, *supra* note 184, at 1198.

<sup>292</sup> See *supra* notes 96–99 and accompanying text.

<sup>293</sup> See *supra* notes 70–76 and accompanying text.

<sup>294</sup> See *supra* notes 47–48 and accompanying text.

<sup>295</sup> Rollins v. Dignity Health, 830 F.3d 900, 912 (9th Cir. 2016), *rev’d on other grounds*, Advocate Health Care Network v. Stapleton, 137 S. Ct. 1652 (2017).

<sup>296</sup> *Id.* (stating that “such a determination does not require this sort of inquiry”).

<sup>297</sup> *Id.*

United Church of Christ and the Evangelical Lutheran Church in America.<sup>298</sup> The court observed that the system “wishes to push the meaning of the exemption to include more organizations, and many more at that,” contrary to ERISA’s central goal of “protect[ing] workers who have invested their retirement savings into employer-run financial plans.”<sup>299</sup> A district court in a similar case observed that allowing any tax-exempt organization to “establish its own pension plan, maintain it, and then employ the church plan exemption by purporting to be controlled by or associated with a church” would create a slippery slope, contrary to Congress’s goal of promoting workers’ interests.<sup>300</sup> As another district court said, this “suggested interpretation would reflect a perfect example of an exception swallowing the rule.”<sup>301</sup>

However, in 2017, the Supreme Court reversed these decisions in *Advocate Health Care Network v. Stapleton*.<sup>302</sup> Justice Elena Kagan, writing for a unanimous Court, concluded that ERISA does authorize entities other than churches to establish church plans.<sup>303</sup> Plans established by “hospitals themselves—not by a church,” could qualify for exemption from ERISA’s requirements.<sup>304</sup>

Justice Sonia Sotomayor concurred to express concern over such a wide-ranging religious exemption. She wrote, “[T]he Court holds that scores of employees—who work for organizations that look and operate much like secular businesses—potentially might be denied ERISA’s protections.”<sup>305</sup> In particular, she said, the multibillion-dollar corporations operating for-profit subsidiaries and competing with secular companies “bear little resemblance” to the church-related entities that Congress considered in enacting the current church plan definition.<sup>306</sup>

Given the Court’s acceptance of a broadly defined exemption for churches and their associates, the pressure will build to circumscribe the category of entities adequately “associated” with churches so as to qualify for ERISA exemption. Recall that ERISA requires an “association” with a church, focusing on whether an entity shares “common religious bonds and

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<sup>298</sup> *Stapleton v. Advocate Health Care Network*, 817 F.3d 517, 520–21, 532 (7th Cir. 2016), *rev’d*, *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652 (2017).

<sup>299</sup> *Id.* at 526.

<sup>300</sup> *Kaplan v. Saint Peter’s Healthcare Sys.*, No. 13-2941 (MAS)(TJB), 2014 WL 1284854, at \*6 (D.N.J. Mar. 31, 2014).

<sup>301</sup> *Rollins v. Dignity Health*, 19 F. Supp. 3d 909, 914 (N.D. Cal. 2013).

<sup>302</sup> 137 S. Ct. at 1657, 1663.

<sup>303</sup> *Id.* at 1656.

<sup>304</sup> *Id.*

<sup>305</sup> *Id.* at 1663 (Sotomayor, J., concurring).

<sup>306</sup> *Id.*

convictions with that church.<sup>307</sup> Courts are likely to be called upon to examine hospitals' ties to churches more closely.<sup>308</sup> Similarly, as Justice Sotomayor suggested, courts might interpret ERISA so as to exclude plans operated by hospital benefits committees on the ground that they are not principal-purpose organizations.<sup>309</sup>

As contract undercuts the rationales for exemption (or the specialness of religion), legislatures, regulators, and courts may police the category of religious institution. They might, for example, prohibit contracts that continue religious identity. Alternatively, presented with claims of entities remote from the core church, courts may scrutinize religious claims more closely and engage with the meaning of "religion" directly. Expanding religious rights in commerce ultimately may result in less autonomy for all institutions—from churches to charitable organizations to for-profit corporations.<sup>310</sup>

Insofar as legislative or regulatory definitions of religious institutions are problematic, policymakers may more carefully circumscribe statutory definitions. For example, Maine grants an exemption to a "religious corporation, association or organization" from employment, housing, and education antidiscrimination law but excludes "[a]ny for-profit organization owned, controlled or operated by a religious association or corporation."<sup>311</sup> Faced with the prospect of religious for-profit entities, legislators may impose an explicit requirement of nonprofit or charitable status.

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<sup>307</sup> 29 U.S.C. § 1002(33)(C) (2012) (defining an organization eligible to participate in church plans exempted from ERISA as one "associated with a church or a convention or association of churches" where the organization "shares common religious bonds and convictions with that church or convention or association of churches").

<sup>308</sup> See, e.g., *Advocate Health Care Network*, 137 S. Ct. at 1656 n.1 (majority opinion). For an example of how this might work, see *Chronister v. Baptist Health*, 442 F.3d 648, 652 (8th Cir. 2006), finding that Baptist Health severed its ties with the Arkansas Baptist State Convention in 1966.

<sup>309</sup> *Advocate Health Care Network*, 137 S. Ct. at 1663–64 (Sotomayor, J., concurring) ("Other provisions also impact the scope of the 'church plan' exemption. Those provisions—including the provisions governing which organizations qualify as principal purpose organizations permitted to establish and maintain 'church plans,' need also be construed in line with their text and with a view toward effecting ERISA's broad remedial purposes." (citation omitted)).

<sup>310</sup> See Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 478 (1985) (arguing that a broad reading of the First Amendment may undermine its core protection in times of crisis); Philip Hamburger, *More Is Less*, 90 VA. L. REV. 835, 885 (2004) ("[T]he Court for decades defined the First Amendment right of free exercise so broadly as to include religiously motivated departures from law . . . [I]n the wake of this experiment, the Court conditions free exercise on government interests, even in cases involving penalties on religion."); Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 654–55 n.140 (1980) (noting that rights can become politically vulnerable when interpreted expansively). But see John D. Inazu, *More Is More: Strengthening Free Exercise, Speech, and Association*, 99 MINN. L. REV. 485, 522–29 (2014) (claiming that rights expansion sometimes increases rights protection).

<sup>311</sup> ME. STAT. tit. 5, § 4553(10)(G) (2011).

Courts likewise might narrowly define religious organization for statutory and constitutional purposes. They might look for “pervasively sectarian” institutions.<sup>312</sup> They could consider whether the primary purpose of the institution is the advancement of religious values or whether its “primary activity . . . consists of voluntary gathering for prayer and religious learning.”<sup>313</sup> The membership of the institution and its capacity to affect nonmembers also could prove relevant.

These strategies may require description of a religious institution, identification of religious pursuits, or definition of religion itself.<sup>314</sup> Defining religious institutions—while precarious—likely involves no more entanglement than arises when courts consider who is a minister for the purposes of the ministerial exception.<sup>315</sup> As Professor Kent Greenawalt has argued, courts must “sometimes decide whether a claim, activity, organization, purpose, or classification is religious.”<sup>316</sup> The *Hobby Lobby* Court seems to invite such inquiry. Courts now must adjudicate whether any particular for-profit corporation is sufficiently “religious” to exercise religion under RFRA.<sup>317</sup>

To the extent that contract drives expansion of exemption, lawmakers could place limits on the duration or scope of religious contract terms. California, for example, recently prohibited the practice of binding new and future owners to religious doctrine.<sup>318</sup> A hospital, once sold, may not retain its religious identity. Similarly, as religious organizations claim a right under RFRA to require contracting parties (such as insurance companies) to abide by their own religious tenets (as with regard to contraception), limitations may be in order.<sup>319</sup> Professor Laycock, for example, proposes courts adopt a

<sup>312</sup> *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 755 (1976) (using multiple factors to identify “pervasively sectarian” institutions for purposes of Establishment Clause test).

<sup>313</sup> *Spencer v. World Vision, Inc.*, 633 F.3d 723, 763 (9th Cir. 2011) (Berzon, J., dissenting).

<sup>314</sup> Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CALIF. L. REV. 753, 753 (1984) [hereinafter Greenawalt, *Religion as a Concept*] (“[W]hen the presence of religion is seriously controverted, the threshold question, ‘defining religion,’ becomes important.”); Murray, *supra* note 179, at 496 (“This may require the Court to define what it means for an institution to be ‘religious,’ or at least come dangerously close.”).

<sup>315</sup> *Elvig v. Calvin Presbyterian Church*, 397 F.3d 790, 797 (9th Cir. 2005) (Kozinski, J., concurring in order denying rehearing en banc) (“Religions vary drastically in their hierarchical and organizational structure, and it is often a tricky business to distinguish spiritual from administrative officials and clergy from congregation. The very invocation of the ministerial exception requires us to engage in entanglement with a vengeance.”).

<sup>316</sup> Greenawalt, *Religion as a Concept*, *supra* note 314, at 753.

<sup>317</sup> *See Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1340–43 (D.C. Cir. 2002).

<sup>318</sup> CAL. CORP. CODE § 5917.5 (West 2003).

<sup>319</sup> *See, e.g., Univ. of Notre Dame v. Sebelius*, 743 F.3d 547, 557 (7th Cir. 2014) (claiming that a nonprofit organization’s religious convictions forbid it from contracting with companies that will provide free coverage for contraceptive services).

rule that “[r]eligious objectors are not entitled to exemptions for secular entities they deal with at arm’s length.”<sup>320</sup>

These proposals highlight the interrelationship between exemption and contract. California’s statute, for example, resolves the problem of zombie religious hospitals but fails to confront the dilemma of second-order affiliate institutions. Once religious commercial institutions are granted an exemption, contract inevitably plays a role in defining the contours of the institution. Limiting particular contracts does not tell us where, assuming a fixed core, the institution’s boundaries lie.

As long as exemptions operate in a commercial space and have value, the problem of contracting religion and zombie religious institutions remains. For example, if nonprofit status proved determinative for exemption, for-profit hospitals—whether Catholic- or investor-owned—would not qualify as religious institutions. In this regard, the category of religious institution would be clear. But nominally secular nonprofit and public partners of Catholic healthcare still might become eligible for religious exemption through an affiliation agreement. And formerly Catholic nonprofit hospitals with no ties to the Church also would seem to be exempt. Once commercial entities are eligible for exemption as religious institutions, thwarting the diffusion of religion through the market proves difficult. Exemption still can extend to affiliates and zombie institutions.

#### CONCLUSION

The experience of the healthcare market destabilizes the theory that religious institutionalism fosters pluralism and nourishes individual free exercise. By contracting religion, institutions affiliated with other faiths and investors devoted to profit assume a religious mantle. And religious identity survives in zombie form. Exemption becomes the rule, and “religious institution” loses its meaning.

With corporations claiming religious goals in commercial pursuits from craft retail to riflescope manufacture to car sales, the pressure on institutional exemptions is likely to increase proportionally. Employees and consumers often have little choice but to encounter religious healthcare institutions. People who hold different or no religious beliefs thus become subject to religious restrictions. The example of ERISA church plans demonstrates that religious exemptions (and objections) are not limited to so-called culture war issues, such as contraception and abortion. Institutional carve-outs can affect

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<sup>320</sup> Brief of Baptist Joint Committee for Religious Liberty as Amicus Curiae in Support of Respondents at 25, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (No. 14-1418), 2016 WL 692850, at \*25.

costly worker-protective regulations—ranging from antidiscrimination obligations to pension protections.

Contracting religion—and the distinct problems it creates for law and theory—may extend beyond the healthcare industry. An array of nonprofit parachurch organizations has sprung up.<sup>321</sup> Some such entities lack formal financial or hierarchical ties to an established religious body or church.<sup>322</sup> Like healthcare facilities, they often offer goods and services in competition with secular or for-profit entities. Well-established churches increasingly depart from the nonprofit charitable model in investing in commercial entities.<sup>323</sup> For-profit corporations unaffiliated with any church seek to join religion and commerce in a variety of sectors.<sup>324</sup> As religion and profit combine across industries, contracts may spread religious compliance and identity. Zombie religious institutions may emerge across the marketplace.

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<sup>321</sup> Murray, *supra* note 179, at 510.

<sup>322</sup> Messner, *supra* note 133, at 69–72.

<sup>323</sup> See Carmella, *After Hobby Lobby*, *supra* note 199, at 441 (noting “examples of churches or religious groups with for-profits in education, social services and health care”); Caroline Winter, *How the Mormons Make Money*, BLOOMBERG (Jul. 18, 2012, 8:45 PM), <https://www.bloomberg.com/news/articles/2012-07-18/how-the-mormons-make-money> [<https://perma.cc/QKJ7-MXHA>] (reporting that the Church of Jesus Christ of Latter-Day Saints owns businesses generating billions of dollars including “a newspaper, 11 radio stations, a TV station, a publishing and distribution company, a digital media company, a hospitality business . . . an insurance business . . . farms, hunting preserves, orchards, and ranches”).

<sup>324</sup> Meese & Oman, *supra* note 68, at 277–79 (compiling examples of often-large for-profit companies asserting religious identity).

